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***Apprendi v. New Jersey*, The Scaling Back of the Sentencing Factor Revolution and the Resurrection of Criminal Defendant Rights, How Far is Too Far?**

I. INTRODUCTION

As one of the “most closely fought and in some respects surprising [decisions] of the term,” and “[w]ith five separate opinions totaling 106 pages,” the 5-4 decision of *Apprendi v. New Jersey*¹ is likely to have broad consequences in the area of defendant sentencing.² The new issue troubling courts throughout the nation is the breadth and scope of the *Apprendi* rule that any fact, other than prior conviction, used to extend a defendant’s sentence over the statutory maximum, must be charged in an indictment, and proven to a jury beyond a reasonable doubt.³ While the majority lauds this case as a return to “the jury tradition that is an indispensable part of our criminal justice system” used to protect individuals’ liberty and due process rights, the dissent fears a “watershed change in constitutional law” which has overruled many of the sentencing factor schemes upheld by the Court in its landmark decision *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).⁴ In

1. 530 U.S. 466 (2000).

2. Linda Greenhouse, *The Supreme Court: Trial by Jury; New Jersey Hate Crime Law Struck Down*, N.Y. TIMES, June, 27, 2000, at A19. “Rarely has any case had such an immediate and dramatic impact on the practice of law.” Erwin Chemerinsky, *A Dramatic Change in Sentencing Practices*, 36 SUP. CT. REV. 102, 102 (2000) (providing a good overview of the *Apprendi* decision); see also Brooke A. Masters, *High Court Ruling May Rewrite Sentencing; Changes in Guidelines, Raft of Appeals Feared After Justices’ Decision*, WASH. POST, July 23, 2000, at A1, available at 2000 WL 19620694 (describing *Apprendi* as “[a] largely overlooked U.S. Supreme Court decision . . .” because it came out “the same week as rulings in long-awaited cases such as, the one that upheld *Miranda* warnings . . .,” another that rejected a law banning “partial birth” abortions, and a third that allowed the Boy Scouts of America to bar gays).

3. See *Apprendi*, 530 U.S. at 489-90; see also Rocco Cammarere, *Apprendi Snowballs Huge Fallout From Ruling Focusing On Sentences*, 9 N.J. LAW.: WKLY. NEWSPAPER 1977, Oct. 9, 2000, at 41.

4. *Apprendi*, 530 U.S. at 497, 524 (O’Connor, J., dissenting), 533 (O’Connor, J., dissenting).

McMillan, the Court effectively ushered in a sentencing factor revolution that “radically restructured the roles of judge and jury by shifting to the court the ability to make at sentencing, and by a preponderance of the evidence, factual determinations that, prior to *McMillan*, had to be made by juries, at trial, and beyond a reasonable doubt.”⁵ Depending on how expansively *Apprendi* is read, *McMillan* has been overruled or greatly scaled back because these facts must now be submitted to a jury and found beyond a reasonable doubt.⁶ The dissent argues the decision casts substantial doubt on the continuing validity of the federal Sentencing Guidelines and capital punishment procedures used in many states.⁷ Tellingly, state and federal courts, as well as legislatures are currently feeling *Apprendi*’s impact in the area of drug offenses where there have been numerous appeals by prisoners convicted under statutes that are now unconstitutional after *Apprendi*.⁸

Although *Apprendi* may have its biggest impact in drug cases,⁹ the decision dealt with the seemingly limited issue of whether New Jersey’s hate-crime statute, which allowed a judge to find a defendant acted with racial prejudice by a preponderance of the evidence, was constitutional.¹⁰ Charles Apprendi fired several shots into his African-American neighbor’s house and confessed to police that he wanted to send a message that black people were not wanted in his neighborhood.¹¹ He pleaded guilty to a weapons violation and possession of a bomb in his home, which carried a ten-year statutory maximum prison sentence.¹² However, because a judge

5. Mark D. Knoll & Richard G. Singer, *Searching for the “Tail of the Dog”: Finding “Elements” of Crimes in the Wake of McMillan v. Pennsylvania*, 22 SEATTLE U. L. REV. 1057, 1058 (1999). It is interesting to note that Richard Singer’s article advocates that juries and not judges should find facts, and that Singer also assisted Charles Apprendi in his appeal to the Supreme Court. *See id.* at 1112; *see also* Melanie Burney, *Beyond a Reasonable Doubt? Court to Consider Whether Judge Should Have Added Punishment*, ABC NEWS.COM (Mar. 28, 2000) (commenting on Singer’s role in the *Apprendi* case), at http://www.abcnews.go.com/sections/us/DailyNews/sctus_hatecrimes000328.html.

6. *See* *Greenhouse*, *supra* note 2, at A19; *see also Apprendi*, 530 U.S. at 533 (O’Connor, J., dissenting); Harv. L. Rev. Ass’n, Note, *Winship on Rough Waters: The Erosion of the Reasonable Doubt Standard*, 106 HARV. L. REV. 1093, 1102 (1993) (discussing how at the time the Supreme Court “has shown no eagerness to modify the *McMillan* approach, leaving sentencing proceedings as perhaps the single most important erosion of *Winship* [’s]” beyond a reasonable doubt and jury requirements). *But cf. Apprendi*, 530 U.S. at 491-93 (finding the statute in *Apprendi* runs counter to *Winship* and declining to apply the *McMillan* five-factor test), 533 (O’Connor, J., dissenting) (arguing the Court should admit it is overruling *McMillan*).

7. *See Apprendi*, 530 U.S. 536-38 (O’Connor, J., dissenting), 555-65 (Breyer, J., dissenting).

8. Cammarere, *supra* note 3, at 41.

9. Lawrence Messina, *U.S. Supreme Court Influencing Sentencing Here Ruling Could Radically Change How Judges Calculate Prison Terms in Federal Court*, CHARLESTON GAZETTE & DAILY MAIL, July 25, 2000, at A2, available at 2000 WL 2619088.

10. *See Apprendi*, 530 U.S. at 468-69.

11. *Id.* at 469.

12. *Id.* at 469-70; *see also* *State v. Apprendi*, 731 A.2d 485, 486-87 (N.J. 1999).

believed Apprendi selected his victim based on race, his sentence was extended beyond the statutory maximum, to twelve years imprisonment.¹³

The Court in *Apprendi* attempted to resolve the issue of when facts/factors such as hate motive can be found by a judge using a preponderance of the evidence, and when they are an element of the crime that must be submitted to a jury and subjected to the most stringent evidentiary standard.¹⁴ More specifically, the Court asked whether a fact that extends a defendant's sentence beyond the statutory maximum is a sentencing factor, which can be proven by a judge by a preponderance of the evidence, or an element of the offense, which must be found by a jury beyond a reasonable doubt.¹⁵ Essentially, the Court concluded that when hatred is used to enhance a defendant's sentence because the defendant acted with the "purpose to intimidate" on account of, *inter alia*, race," then this fact is an element of the crime because it goes to the criminal's *mens rea*.¹⁶ Most importantly, the Court held that *any* fact, other than recidivism, which "increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."¹⁷

This Note will analyze the *Apprendi* decision, discuss its potential impact, and argue that it should be narrowly construed. Part II traces the development of major cases that makeup the Supreme Court's due process jurisprudence and *Apprendi*'s foundation.¹⁸ Case law will be examined to determine the policy and constitutional concerns that drive whether a fact is an element of a crime or a sentencing factor.¹⁹ This section will also discuss how the *McMillan* five-factor test has influenced the Supreme Court's interpretation of sentencing factors and the tensions this test has created with previous decisions that seem to require the beyond a reasonable doubt

13. *Apprendi*, 530 U.S. at 470-71.

14. Erwin Chemerinsky, *Law Enforcement and Criminal Law Decisions*, 28 PEPP. L. REV. 517, 520 (2001).

15. *Id.* Determining whether a defendant committed a criminal act because they hated the victim's race, religion, sexual orientation, or gender, is a difficult and complex endeavor because the very "deepest recesses of the human mind" must be probed in order to "prove the existence of inappropriate thoughts" motivated particular criminal acts. Robert J. Corry, Jr., *Burn This Article: It Is Evidence In Your Thought Crime Prosecution*, 4 TEX. REV. L. & POL. 461, 470 (2000). At trial, the defendant's friendships, relationships, memberships and even bookshelves are scrutinized and criticized to determine if there is any evidence of bias towards a particular group. *Id.* at 471, 475. Due to the sensitive nature of this task, and the significant deprivation of liberty the defendant faces, determining the existence of one's hate motive should be done by a jury and proved beyond a reasonable doubt. *Id.* at 481.

16. *Apprendi*, 530 U.S. 492-93 & nn.17-18 (noting *mens rea* is a core element of a crime); see also Chemerinsky, *supra* note 14, at 519-21.

17. *Apprendi*, 530 U.S. at 490.

18. See *infra* notes 29-145 and accompanying text.

19. See *infra* notes 29-58 and accompanying text.

standard whenever a defendant's sentence is increased.²⁰ Part III presents the statement of facts in *Apprendi*.²¹ Part IV provides an in-depth analysis of the Court's rationale in the majority,²² concurring,²³ and dissenting opinions.²⁴ Part V will evaluate the potential impact of the Court's holding on the judicial system,²⁵ legislature,²⁶ and individuals.²⁷ The Note will briefly conclude in Part VI.²⁸

II. HISTORICAL BACKGROUND

A. *In re Winship: An Analysis of the Constitutional and Policy Concerns Supporting a Jury Finding Facts Beyond a Reasonable Doubt Over a Judicial Determination by a Preponderance of the Evidence*

The Supreme Court has never determined whether the Constitution requires reasonable doubt to be defined,²⁹ however, this level of proof is frequently characterized as "moral certainty" or "the highest degree of certitude based on [the] evidence."³⁰ On the other end of the proof spectrum is the preponderance of the evidence standard,³¹ which is thought of as being a standard that is proven merely by producing the greater quantum of evidence.³² In order to clarify when each standard is appropriate in criminal

20. See *infra* notes 58-145 and accompanying text.

21. See *infra* notes 146-170 and accompanying text.

22. See *infra* notes 171-209 and accompanying text.

23. See *infra* notes 210-227 and accompanying text.

24. See *infra* notes 228-274 and accompanying text.

25. See *infra* notes 275-369 and accompanying text.

26. See *infra* notes 370-379 and accompanying text.

27. See *infra* notes 380-397 and accompanying text.

28. See *infra* notes 398-406 and accompanying text.

29. *Victor v. Nebraska*, 511 U.S. 1, 26 (1994) (Ginsburg, J., concurring). Although it is clear that trial courts must instruct juries that they can only convict if the proof is beyond a reasonable doubt, it is uncertain whether trial judges must give juries a definition of the standard. Jessica N. Cohen, *The Reasonable Doubt Jury Instruction: Giving Meaning to a Critical Concept*, 22 AM. J. CRIM. L. 677, 678 (1995); see also generally Lawrence M. Solan, *Refocusing the Burden of Proof In Criminal Cases: Some Doubt About Reasonable Doubt*, 78 TEX. L. REV. 105, 112-18 (1999) (discussing various jurisdictional approaches to defining beyond a reasonable doubt and urging those that do not define to provide guidance to their juries).

30. *Id.* at 111.

31. Benjamin E. Rosenberg, *Criminal Acts and Sentencing Facts: Two Constitutional Limits on Criminal Sentencing*, 23 SETON HALL L. REV. 459, 489-90 (1993). Clear and convincing evidence is the intermediate standard, which sits between the highest standard - beyond a reasonable doubt, and the lowest level of proof - preponderance of the evidence. *Id.* Clear and convincing proof is defined as being highly probable or reasonably certain. BLACK'S LAW DICTIONARY 577 (7th ed. 1999).

32. *In re Winship*, 397 U.S. 358, 367-68 (1970). The Supreme Court explained "preponderance of the evidence is... [e]vidence which is... more convincing than the evidence... offered in opposition to it..." *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997) (alteration in original) (quotation omitted). Additionally, unlike beyond a reasonable

cases, the Supreme Court has developed case law that focuses on the due process requirements of the Constitution.³³

The Court held for the first time in *In re Winship* that every element of a crime must be proven beyond a reasonable doubt to a jury.³⁴ This seminal case became the foundation for cases like *Mullaney v. Wilbur*, yet appeared to be reduced in importance by later cases like *Patterson v. New York*, *McMillan v. Pennsylvania*, and *Almendarez-Torres v. United States* that endorsed judicial finding of facts by a preponderance of the evidence.³⁵ Ultimately, *Winship* along with these other cases stand for the proposition that the Court has attempted to balance the competing interests of the State's need to penalize guilty persons, and the equally important goal of protecting the accused's liberty.³⁶ Furthermore, the Court recognizes that state legislatures must have great flexibility in defining elements of crimes and sentencing factors.³⁷

The Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution provide that no person shall "be deprived of life, liberty, or property, without due process of law."³⁸ Although it is a fundamental principle of common law that the prosecution must prove to a jury that the accused is guilty of every element of the crime charged beyond a reasonable doubt,³⁹ it was not until 1970 that the Supreme Court held that

doubt and clear and convincing evidence, under a preponderance standard, "'both parties [] share the risk of error in roughly equal fashion,' except that 'when the evidence is evenly balanced, the [party with the burden of persuasion] must lose.'" *Id.* (quotations omitted).

33. See *infra* text accompanying notes 34-145.

34. Harv. L. Rev. Ass'n, *supra* note 6, at 1094.

35. *Id.* at 1093-94, 1100-03; see also *Mullaney v. Wilbur*, 421 U.S. 684, 702 (1975) (holding prosecution must prove facts critical to criminal culpability); *Patterson v. New York*, 432 U.S. 197, 214-15 (1977) (limiting the holding of *Mullaney* and giving legislatures broad discretion to define elements of crimes); *McMillan v. Pennsylvania*, 477 U.S. 79, 87-91 (1986) (coining the term "sentencing factor" and setting forth a five-factor test to determine whether the sentencing factor is constitutional); *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (upholding recidivism as a sentencing factor even though it extended conviction beyond statutory maximum).

36. Rosenberg, *supra* note 31, at 496-97.

37. See *infra* notes 59-83 and accompanying text. Whether a fact is defined as an element or sentencing factor makes a significant difference in the kinds of rights and procedural protections that are triggered. Timothy Crooks, *Grid & Bear It: Sentencing Enhancements or Elements: What's In a Name?*, 23 CHAMPION 40, 40 (1999). A fact that is an element must be proved by the prosecution beyond a reasonable doubt and submitted to the jury. *Id.* Also, when there is a constitutional right to grand jury indictment, the fact must be charged in the indictment. *Id.* In contrast, a sentencing factor/fact (sentencing enhancement) adds to the length of sentence that a defendant faces and usually only needs to be proved by a preponderance of the evidence to a judge. *Id.* Furthermore, it need not be charged in the indictment. *Id.*

38. U.S. CONST. amends. V, XIV, § 1. Additionally, the Sixth Amendment guarantees the right to a jury in all criminal trials. U.S. CONST. amend. VI.

39. *In re Winship*, 397 U.S. 358, 361 (1970). A higher level of proof in criminal trials has been required since ancient times and the beyond a reasonable doubt standard has been in use since the

the beyond a reasonable doubt standard must be used at every criminal trial.⁴⁰ In *Winship*, a twelve-year-old boy was charged with larceny for entering a woman's locker and stealing \$112.⁴¹ The judge admitted that there was not enough proof to convict beyond a reasonable doubt, but that the defendant was guilty under the lesser standard by a preponderance of the evidence.⁴² The Court explicitly held that the Fourteenth Amendment provides the constitutional guarantee that every fact necessary to prove the crime must be proven beyond a reasonable doubt.⁴³ The Court found that due process requires a high level of persuasion, because the beyond a reasonable doubt standard is part of the "historically grounded rights of our system."⁴⁴

Furthermore, the Constitution mandates this standard because it serves policy interests that are of the utmost importance in our criminal system.⁴⁵ The beyond a reasonable doubt standard reduces the risk of convicting an innocent person because of factual error,⁴⁶ and ensures that he will not lose his liberty nor be subjected to social stigmatization, except upon a finding based on the highest level of proof.⁴⁷ The standard also "'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.'"⁴⁸ Finally, this level of persuasion is needed to "command the respect and confidence of the community" and ensure "the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."⁴⁹

earliest years of our nation. *Id.* However, the term "beyond a reasonable doubt" appeared as late as 1798. *Id.*; see also Solan, *supra* note 29, at 110 (finding the term began being widely used circa the late eighteenth or early nineteenth century, and it was not until the later part of the nineteenth century that there was consensus among the courts that this expression was used to describe the highest level of proof).

40. Cohen, *supra* note 29, at 678.

41. *Winship*, 397 U.S. at 360.

42. *Id.*

43. *Id.* at 364. The Court also held that the beyond a reasonable doubt standard applies equally to adults and juveniles when they are charged with a crime which if committed by an adult would be a crime. *Id.* at 359, 365.

44. *Id.* at 362-63.

45. *Id.* at 363-64. In our criminal system, proof beyond a reasonable doubt is a constitutional safeguard that goes hand-in-hand with the accused's right to notice of charges, right of confrontation and examination, right to counsel and privilege against self-incrimination. *Id.* at 368. These constitutional safeguards are all accuracy-enhancing rights that guard against arbitrary verdicts and make the outcome of the proceeding more certain. Rosenberg, *supra* note 31, at 464.

46. *Winship*, 397 U.S. at 363.

47. *Id.* The Court stated that the beyond a reasonable doubt standard presumes the innocence of the accused because it would be fundamentally unfair to imprison a person for many years and take away his freedom based on the lesser standard used in a civil case. *Id.* The beyond a reasonable doubt standard is proper "[w]here one party has at stake an interest of transcending value" such as their liberty; which justifies that the other party, the prosecution, bear this high level of burden of proof. *Id.* at 364 (quoting *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958)).

48. *Id.* (quoting Norman Dorsen & Daniel A. Rezneck, In re *Gault and the Future of Juvenile Law*, 1 FAM. L. Q., No. 4, at 1, 26 (1967)).

49. *Id.*

Although Justice Harlan conceded that the varying standards of proof are vague, imprecise, “not a very sure guide to decisionmaking,” and that at the very best all the factfinder can do is acquire a “belief of what *probably* happened,”⁵⁰ the level of persuasion used is critical. “[A] standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.”⁵¹ Most importantly, the standard of proof used is key in effecting the outcome of whether a criminal is guilty or innocent.⁵² Under a preponderance of the evidence standard, guilty defendants are more frequently convicted.⁵³ However, under this level of proof, there is also a greater risk of finding innocent people guilty.⁵⁴ Conversely, when beyond a reasonable doubt is used, more guilty defendants go free, but fewer innocent people are wrongly convicted.⁵⁵ As a result, “the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each.”⁵⁶ Therefore, as Justice Harlan stated in his famous concurrence,⁵⁷ this means that in a criminal trial, every element of a crime must be proved beyond a reasonable doubt because “it is far worse to convict an innocent man than to let a guilty man go free.”⁵⁸

B. Mullaney v. Wilbur and Patterson v. New York: Striking the Balance Between Facts that Must be Proved Beyond a Reasonable Doubt and the Legislature’s Ability to Define Which Facts Can be Found by a Preponderance of the Evidence

In order to determine what level of protection an accused receives under the Due Process Clause, the Court looks at the type of proceeding involved and the interests a criminal defendant has at stake.⁵⁹ This raises the question of what burden of proof should be used to determine particular facts.⁶⁰ The

50. *Id.* at 369-70 (Harlan, J., concurring).

51. *Id.* at 370.

52. *See id.* at 370-71.

53. *See id.* at 371.

54. *Id.*

55. *See id.*

56. *Id.* at 371. Justice Harlan explained that in criminal cases the social utility of convicting a guilty person is outweighed by the concern of erroneously finding someone guilty. *Id.* at 372.

57. Solan, *supra* note 29, at 109.

58. *Winship*, 397 U.S. at 372.

59. Todd Meadow, Almendarez-Torres v. United States: *Constitutional Limitations on Government’s Power to Define Crimes*, 31 CONN. L. REV. 1583 (1999).

60. *See Winship*, 397 U.S. at 369 (Harlan, J., concurring).

Court in *Mullaney v. Wilbur*⁶¹ strengthened *Winship* by holding that facts which are important to proving the crime itself was committed, such as mental state, must be proved by the prosecution and found beyond a reasonable doubt by a jury.⁶²

In *Mullaney*, the statute was found unconstitutional because there was a statutory *presumption* that the defendant committed the crime of murder with “malice aforethought,” unless the defendant could show by a preponderance of the evidence that he acted in the heat of passion.⁶³ The effect of this statute was that the prosecution did not have to prove the defendant’s mental state beyond a reasonable doubt because it was presumed.⁶⁴ Therefore, the burden rested on the defendant to show heat of passion by a preponderance of the evidence.⁶⁵ The Court held that an important factor, such as mental state, cannot be presumed and the prosecution must prove the factor exists to a jury beyond a reasonable doubt.⁶⁶

The Court compared *Mullaney* to *Winship* and found that mental state was an important factor because the due process interests implicated here were greater than those at stake in *Winship*.⁶⁷ In *Mullaney* the defendant “face[d] a differential in sentencing ranging from a nominal fine to a mandatory life sentence” based on whether the mental state was found to exist.⁶⁸ Based on this analysis, the Court made clear that the prosecution must prove beyond a reasonable doubt all critical facts that make up the crime.⁶⁹ The Court reasoned that,

61. 421 U.S. 684 (1975).

62. See *Mullaney*, 421 U.S. at 698-99, 704. *Mullaney* clarified *Winship* by holding that due process safeguards extend “to determinations that [go] not [only] to a defendant’s guilt or innocence, but simply to the length of his sentence.” *Apprendi*, 530 U.S. 466, 484 (2000) (quoting *Almendarez-Torres*, 523 U.S. 684, 251 (1998) (Scalia, J., dissenting)). Under *Mullaney*, any fact which is critical to proving the crime and bears heavily on the length of sentence must be proved by the State. *Mullaney*, 421 U.S. at 701.

63. *Id.* at 689, 703; see also *Patterson v. New York*, 432 U.S. 197, 200-01 (1977) (describing why the statute in *Mullaney* was unconstitutional).

64. *Mullaney*, 421 U.S. at 688.

65. *Id.* at 686-88. If the defendant proved heat of passion, the result was that his sentence would be reduced to manslaughter. *Id.*

66. *Id.* at 701-02, 704.

67. *Id.* at 700. In *Winship*, the defendant only faced an eighteen-month sentence, with the possible extension of four and one-half years of imprisonment. *Id.*

68. *Id.*

69. See *id.* at 701. This is mandated by *Winship*’s rationale that “[w]here one party has at stake an interest of transcending value . . .” such as liberty, the prosecution bears the burden of proving the existence of key facts that if found, would result in that liberty being taken away. *Id.* at 699-701 (quoting *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958); citing *In re Winship*, 397 U.S. 358, 370-72 (1970) (Harlan, J., concurring)).

if *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect” just by redefining “the elements that constitut[ed] different crimes, characterizing them as factors that bear solely on the extent of punishment.”⁷⁰

Furthermore, although in *Mullaney* the judge was not determining the factor by a preponderance of the evidence, the Court recognized that “[t]he safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty.”⁷¹ Thus, *Mullaney* would be the foundation for the holding in *Apprendi* where the Court determined that a judge could not use a preponderance of the evidence standard to determine the important mental element of racial hate.⁷²

Two years later, the Court in *Patterson v. New York*⁷³ began limiting the breadth of *Mullaney*.⁷⁴ The Court recognized that setting up criminal procedure policies and defining elements of crimes is a traditional state function, and that the judiciary “should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States.”⁷⁵ Based on principles of state sovereignty, it is proper to defer to the states’ procedures and definitions, unless they “‘offen[d] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’”⁷⁶ As a result of *Patterson*, the burden of proof can be shifted to the defendant⁷⁷ as long as the prosecution proves “every ingredient of an

70. *Almendarez-Torres v. United States*, 523 U.S. 224, 240 (1998) (quoting *Mullaney*, 421 U.S. at 688) (analyzing the relationship between *Mullaney* and *Winship*).

71. *Mullaney*, 421 U.S. at 698.

72. *Winship* is not limited to those facts that are defined as elements of the crime by the states because “*Winship* is concerned with substance rather than this kind of formalism.” *Id.* at 698-99; see also *Apprendi v. New Jersey*, 530 U.S. 466, 494-95 (2000) (quoting *Mullaney*, 421 U.S. at 698) (concluding the New Jersey statute “runs directly into our warning in *Mullaney* that *Winship* is concerned as much with the category of substantive offense as ‘with the degree of criminal culpability’ assessed” and therefore states may not redefine the elements of the crime). Hate motive is an element of a crime if it increases the punishment beyond the maximum statutory range. *Apprendi*, 530 U.S. at 494-95.

73. 432 U.S. 197 (1977).

74. See *id.* at 214-15. “[T]he *Mullaney* holding should not be so broadly read” because states can define the elements of a crime and allocate burdens of proof. *Id.* at 215.

75. *Id.* at 201. The Court explained in *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986), that “*Patterson* stressed that in determining what facts must be proved beyond a reasonable doubt the state legislature’s definition of the elements of the offense is usually dispositive”

76. *Patterson*, 432 U.S. at 202 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

77. See *id.* at 203 n.9, 210.

offense beyond a reasonable doubt,” and does not “shift the burden of proof to the defendant by presuming that ingredient, . . .” as seen in *Mullaney*.⁷⁸

This means that once facts constituting the crime, including defendant’s mental state, are established by the prosecution beyond a reasonable doubt, the court may refuse to sustain an affirmative defense, like insanity, unless the defendant proves it by a preponderance of the evidence.⁷⁹ Unlike *Mullaney*, where the prosecution never had to prove the absence of heat of passion, here the State must prove the defendant’s *mens rea* beyond a reasonable doubt, regardless of whether the defendant can rebut by showing insanity.⁸⁰ As a result, states have great flexibility in determining which facts must be proved beyond a reasonable doubt, and those that may be found by a preponderance of the evidence as long as the prosecution proves the *critical* facts (elements of a crime) beyond a reasonable doubt.⁸¹ Thus, states are free to define crimes and allocate burdens of proof “without any impediment from *Winship*,”⁸² with the caveat that “[i]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.”⁸³

78. *Id.* at 215. In *Patterson*, the statute required the state to prove every element of the crime of murder beyond a reasonable doubt, and made the defendant prove the affirmative defense of insanity by a preponderance of the evidence. *Id.* at 199-200.

79. *Id.* at 205-06.

80. *See id.* at 205-07 (finding that the government proved “‘every fact necessary to constitute the crime with which [Patterson was] charged’”) ((alteration in original) (quoting *In re Winship*, 397 U.S. 358, 364 (1970))). States can require the affirmative defense be proved by a preponderance of the evidence because this makes it more certain that the affirmative defense, such as insanity, really exists. *See id.* at 209. If defendants did not have to prove the affirmative defense by a preponderance of the evidence, then many guilty persons would go free under the beyond a reasonable doubt standard because the slightest indication that the person was insane could result in an acquittal. *See id.* at 208. Furthermore, “[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.” *Id.*

81. *See id.* at 207. State legislatures have flexibility to allocate burdens of proof because “[t]raditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society’s interests against those of the accused have been left to the legislative branch.” *Id.* at 210. As long as states stay within constitutional boundaries by proving beyond a reasonable doubt all the elements that define the crime, then states are free to reallocate burdens of proof for other facts. *See id.* Thus, the prosecution need not bear the difficult burden and heavy risk of proving all facts beyond a reasonable doubt. *See id.* at 207-08.

82. *Jones v. United States*, 526 U.S. 227, 241 (1999). *But cf. Patterson*, 432 U.S. at 210 (noting “there are obviously constitutional limits beyond which the States may not go”).

83. *Patterson*, 432 U.S. at 210 (quoting *McFarland v. Am. Sugar Ref. Co.*, 241 U.S. 79, 86 (1916)). “The legislature cannot ‘validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt.’” *Id.* (quoting *Tot v. United States*, 319 U.S. 463, 469 (1943)).

C. McMillan v. Pennsylvania: The Court Creates a Five-Factor Test to Determine When Sentencing Factors Can be Found by a Judge Using a Preponderance of the Evidence

The Court significantly extended legislatures' discretion to allocate burdens of proof to particular facts when it decided 5-4 in *McMillan v. Pennsylvania*, that judges could use "sentencing factors" to enhance or reduce a defendant's punishment.⁸⁴ Again, the Court deferred to the state's definition of the elements of the crime and evidentiary standards noting that the legislature expressly identified the statutory provision as a sentencing factor.⁸⁵ The Court recognized that it has "never attempted to define precisely the constitutional limits noted in *Patterson*, i.e., the extent to which due process forbids the reallocation or reduction of burdens of proof in criminal cases, . . ." and did not attempt to do so in *McMillan*.⁸⁶ Instead of setting forth a bright-line test, the Court used five factors to determine whether the sentencing factor/allocation of burden scheme was valid.⁸⁷

The statute in *McMillan* required the prosecution to prove the elements of various felonies, such as robbery, assault, and manslaughter beyond a reasonable doubt.⁸⁸ After the jury convicted the defendants, the judge was allowed to extend their sentence within the statutory range set for each of the felonies, if the court found by a preponderance of the evidence visible possession of a firearm.⁸⁹ The Court concluded that this sentencing factor

84. See *McMillan v. Pennsylvania*, 477 U.S. 79, 91-92 (1986). *McMillan* was the first case in which the Supreme Court recognized the term "sentencing factor." *Apprendi v. New Jersey*, 530 U.S. 466, 485 (2000); see also Knoll & Singer *supra* note 5, at 1058 (arguing that *McMillan* was clearly a major turning point in American criminal procedure and defendant's rights cases).

85. *McMillan*, 477 U.S. at 85-86. The Court found the statute in *McMillan* was controlled by *Patterson*, rather than *Mullaney* because "[t]he applicability of the reasonable-doubt standard . . . has always been dependent on how a State defines the offense that is charged in any given case." *Id.* at 85 (alteration in original) (quoting *Patterson*, 432 U.S. at 211 n.12). The Court reiterated the holding of *Patterson* that "dealing with crime is much more the business of the States than it is of the Federal Government" and therefore the Court will not intrude unless a fundamental principle of justice is offended. *Id.* (quoting *Patterson*, 432 U.S. at 201).

86. *Id.* at 86.

87. See *id.* at 86-91; see also *Almendarez-Torres v. United States*, 523 U.S. 224, 242-43 (1998) (listing the *McMillan* factors).

88. See *McMillan*, 477 U.S. at 81 n.1, 82 & n.2.

89. *Id.* at 81. If the judge finds visible possession of a firearm, the mandatory minimum sentence is at least five years imprisonment. *Id.* at 81-82. However, this scheme is constitutional because the statute "operates to divest the judge of discretion to impose any sentence of less than five years for the underlying felony; it does not authorize a sentence in excess of that otherwise allowed for that offense." *Id.* This holding is consistent with *Patterson* because in that case, the Court "rejected the claim that whenever a State links the 'severity of punishment' to 'the presence or absence of [sic] an identified fact' the State must prove that fact beyond a reasonable doubt." *Id.* at 84 (quoting

scheme was constitutional because: (1) “the [statute] plainly d[id] not transgress the limits expressly set out in *Patterson*. . . . [T]he Due Process Clause precludes States from . . . ‘declar[ing] an individual guilty or presumptively guilty of a crime.’”⁹⁰ (2) The situation was not like *Mullaney*, where “once the State proved the elements which Maine required it to prove beyond a reasonable doubt the defendant faced ‘a differential in sentencing ranging from a nominal fine to a mandatory life sentence.’”⁹¹ (3) The statute did not “alter[] the maximum penalty for the crime committed”⁹² and it “operate[d] solely to limit the sentencing court’s discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm.”⁹³ (4) The statute did not “create[] a separate offense calling for a separate penalty.”⁹⁴ (5) The statute did not permit the sentencing factor “to be a tail which wags the dog of the substantive offense,”⁹⁵ “but, to the contrary, ‘simply [took] one factor that has always been considered by sentencing courts to bear on punishment . . . and dictated the precise weight to be given that factor.’”⁹⁶

Patterson, 432 U.S. at 214).

90. *Id.* at 86-87 (quoting *Patterson*, 432 U.S. at 210). The statute in *McMillan* created no presumptions that the defendants committed any of the key facts that comprised the elements of the crimes. *See id.* at 87.

91. *Id.* at 87 (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 700 (1975)). In *McMillan*, the length of the sentence that a judge could impose if he or she found visible possession of a firearm was confined within the statutory range for the felonies. *See id.* at 87-88. Therefore, the sentencing factor did not go beyond the statutory maximums set for each of the felonies. *See id.*

92. *Id.*

93. *Id.* at 88. The statute only imposed a minimum of five years imprisonment if a firearm was present, which was within the statutory range for each of the felonies regardless of finding visible possession of a firearm. *See id.* For example, someone who commits rape could be sentenced from one year to a maximum of twenty years. *See id.* at 87. The mandatory minimum of five years if a firearm was present was within the maximum range of twenty years. *See id.*

94. *Id.* at 88.

95. *Id.* The “tail” is the sentencing factor, and the “dog” is the substantive offense. Knoll & Singer, *supra* note 5, at 1058. Thus, the sentencing factor cannot be one of the key facts required to prove the substantive offense, e.g., rape, robbery, etc. *See id.* Furthermore, the sentencing factor cannot expose the defendant to a sentence that is greater than the statutory maximum of rape, robbery, etc. *See id.*

96. *Almendarez-Torres v. United States*, 523 U.S. 224, 243 (1998) (alteration in original) (quoting *McMillan*, 477 U.S. at 89-90). The Court was deferential to state programs and found that historically, possession of a firearm had not required proof beyond a reasonable doubt. *See McMillan*, 477 U.S. at 90.

However, the dissent in *McMillan* argued that the notion of a sentencing factor was unconstitutional and controversial because any fact that stigmatizes the defendant and gives rise to a special punishment should be considered an element of the crime. *Id.* at 103 (Stevens, J., dissenting). For the dissent it was irrelevant that the five-year mandatory minimum was within the statutory maximum range for assault. *See id.* at 103-04 (Stevens, J., dissenting). The result of the sentencing factor was still an increase in the defendant’s punishment (because the defendant could no longer be sentenced to less than five years) and there is greater stigma attached when one is found to have possessed a gun. *See id.* (Stevens, J., dissenting). Therefore, the dissent found that *McMillan* went directly against the holdings in *Winship* and *Mullaney*. *See id.* at 102-03 (Stevens, J., dissenting).

D. Almendarez-Torres v. United States: The Court Applies the McMillan Five-Factor Test to Uphold Recidivism as a Sentencing Factor, Even Though it Increases the Defendant's Sentence Beyond the Statutory Maximum

After *McMillan*, the question remained open whether the sentencing scheme had to satisfy all five factors.⁹⁷ This question was answered in another controversial 5-4 decision, in *Almendarez-Torres*, where the Court continued to take a lenient stance towards the legislature's definition of what facts could be used as sentencing factors.⁹⁸ In *Almendarez-Torres*, the Court broadened *McMillan* by holding that all the factors need not be met because even if a sentencing factor greatly lengthens the statutory penalty, it is still constitutional for a judge to determine the presence of this fact.⁹⁹

In *Almendarez-Torres*, the defendant was indicted for illegally reentering the United States.¹⁰⁰ Under the federal statute, normally an illegal alien who reentered the United States could only be sentenced up to two years imprisonment, but if the judge concluded by a preponderance of the evidence that the defendant had previously been deported for committing felonies, then he could be imprisoned up to twenty years for recidivism.¹⁰¹ The accused admitted he had previously been convicted and deported for felonious crimes.¹⁰² However, the defendant claimed he could only be sentenced for two years because the indictment did not state that recidivism was an element of the crime.¹⁰³ Thus, the Court addressed the issue of

97. The majority in *McMillan* acknowledged that the factor test meant that whether a statute was constitutional would "depend on differences of degree" and thus, it was unclear which factors must be met. *Id.* at 91.

98. See *Almendarez-Torres*, 523 U.S. at 228 (finding that defining which facts make up the elements of a crime and those that are merely sentencing factors is "normally a matter for Congress"). Justice Breyer was joined by Rehnquist, C.J., O'Connor, J., Kennedy, J., and Thomas, J.. *Id.* at 226. The dissent was written by Scalia, J., and joined by Stevens, J., Souter, J., and Ginsburg, J.. *Id.* This is an interesting alignment of the Court because it presents the competing analytical frameworks of statutory construction: Justice Breyer's contextualism and Scalia's textualism. Roberta Sue Alexander, Note, *Dueling Views of Statutory Interpretation and the Canon of Constitutional Doubt: Almendarez-Torres v. United States*, 118 S. Ct. 1219 (1998), 24 U. DAYTON L. REV. 375, 377 (1999).

99. Knoll & Singer, *supra* note 5, at 1059; see also *Jones v. United States*, 526 U.S. 227, 268 (1999) (Kennedy, J., dissenting) (noting that in *Almendarez-Torres*, 523 U.S. at 247, the Court rejected the notion that "any significant increase in a statutory maximum sentence would trigger a constitutional 'elements' requirement").

100. *Almendarez-Torres*, 523 U.S. at 227. The statutory maximum for an alien who had previously committed felonies was twenty years. *Id.*

101. *Id.* at 226.

102. *Id.* at 227.

103. *Id.*

whether recidivism was a separate crime, or an element of the crime, or simply a sentencing factor.¹⁰⁴

The Court began answering this question by looking at the “statute’s language, structure, subject matter, context, and history-factors that typically help courts determine a statute’s objectives and thereby illuminate its text.”¹⁰⁵ Next, the Court addressed the impact of *Winship* on sentencing factors.¹⁰⁶ Justice Breyer quickly dismissed this consideration and explained that *Winship* did not decide this case because it simply stands for the proposition that every element of a crime must be proved beyond a reasonable doubt.¹⁰⁷ *Winship* says nothing about “whether, or when, the Constitution requires the Government to treat a particular fact as an element”¹⁰⁸

Shortly thereafter, the Court concluded *Mullaney* did lend the petitioner a stronger argument in his favor.¹⁰⁹ The Court focused on *Mullaney*’s holding that states may not just redefine the “‘elements that constitut[e] different crimes, [by] characterizing them as factors that bear solely on the extent of punishment.’”¹¹⁰ Surprisingly, the Court conceded that if “[r]ead literally, this language, . . . suggests that Congress cannot permit judges to increase a sentence in light of recidivism, or any other [sentencing] factor, not set forth in an indictment and proved to a jury beyond a reasonable doubt.”¹¹¹ Furthermore, read textually, *Mullaney*’s language means that “the Constitution requires that most, if not all, sentencing factors be treated as elements,”¹¹² however, “*Patterson* suggests the exact opposite, namely, that the Constitution requires scarcely any sentencing factors to be treated in that way.”¹¹³

Although the Court recognizes strong tension between *Mullaney* and *Patterson*, the Court is able to reconcile them by concluding “these cases, taken together, [stand] for the broad proposition that *sometimes* the Constitution does require (though sometimes it does not require) the State to treat a sentencing factor as an element.”¹¹⁴ Clearly, the Court accepts sentencing factors in general as constitutional, and recognizes that *Winship*,

104. *Id.* at 226, 228.

105. *Id.* at 228. The Court analyzed in detail the statutory text and legislative history and concluded that Congress clearly intended for recidivism to be a sentencing factor. *See id.* at 229-34.

106. *See id.* at 239-40.

107. *Id.* at 239-40.

108. *Id.* at 240.

109. *See id.* at 240.

110. *Id.* at 240 (quoting *Mullaney*, 421 U.S. at 698); *see also supra* notes 59-72 and accompanying text.

111. *Almendarez-Torres*, 523 U.S. at 240.

112. *Id.* at 241.

113. *Id.* The Court cited *Patterson* for the rule that although the severity of punishment may be linked to the “‘presence or absence of an identified fact,’” this alone does “not automatically make the fact an ‘element.’” *Id.* at 242 (quoting *McMillan*, 477 U.S. at 84 (citing *Patterson*, 432 U.S. at 214)).

114. *Id.*

Mullaney, and *Patterson* do not really provide any standard by which to judge whether the sentencing factor is actually an element of the crime that must be proved beyond a reasonable doubt.¹¹⁵ Therefore, it is necessary to subject the sentencing factor to the five-factor balancing test in *McMillan* and determine whether the sentencing factor is more like an element of the crime.¹¹⁶

The Court listed the five factors and concluded that the statute in *Almendarez-Torres* meets all of the factors except for the third one because "it does 'alte[r] the maximum penalty for the crime,' and it also creates a wider range of appropriate punishments" than the statute in *McMillan*.¹¹⁷ However, the Court found this did not render the statute unconstitutional because it met four out of the five factors in *McMillan*.¹¹⁸ First, the Court recognized that the sentencing factor, recidivism, "is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence."¹¹⁹ Second, the Court found that although the statute in *Almendarez-Torres* did not set a mandatory minimum (like the statute in *McMillan*) and instead triggered an increase in the maximum sentence,¹²⁰ this did not disadvantage the defendant.¹²¹ Third, the statute's broad sentencing range of twenty years did not alone "create significantly greater unfairness" because "[j]udges (and parole boards) have typically exercised their discretion within broad statutory ranges."¹²² Lastly, the statute did not "change a pre-existing definition of a well-established crime, nor is there any . . . reason . . . to think Congress intended to 'evade' the Constitution,

115. *See id.*

116. *See id.* at 242-43.

117. *Id.* at 243 (alteration in original) (quoting *McMillan*, 477 U.S. at 87).

118. *See id.*

119. *Id.* (finding recidivism laws date back to colonial times, and that currently recidivism laws exist in all fifty states).

120. *Id.* at 244. An increase in the maximum sentence occurs because normally, without recidivism the defendant can only be sentenced to two years maximum. *Id.* at 229-30, 244. However, if the court determines the defendant was previously convicted of a felony, the maximum sentence available is now increased to twenty years. *Id.*

121. *Id.* at 244. An increase in the maximum sentence actually works to the defendant's benefit. *See id.* For example, when the maximum is increased, the court is free to give the defendant anywhere from one to twenty years in prison, whereas with a mandatory minimum, the judge must sentence the defendant to at least five years in prison. *See id.* at 244-45. Furthermore, the risks of unfair results are higher with a mandatory minimum than with a permissive maximum because the judge has less discretion in choosing the length of sentence. *See id.* at 245.

122. *Id.* The Court noted that it is constitutional for judges to determine facts that impose even more severe punishments than the one at issue in *Almendarez-Torres*. *Id.* at 247. For instance, judges can find the existence of facts that decide whether the defendant should be sentenced to death or life in prison. *Id.*

either by ‘presuming’ guilt or ‘restructuring’ the elements of an offense.”¹²³ Therefore, the Court held that the sentencing factor recidivism is not an element of the crime, and implied other sentencing factors, which increase a defendant’s penalty beyond the statutory maximum, could also be constitutional.¹²⁴

E. Jones v. United States: The Court Foreshadows its Holding in Apprendi By Indicating that Factors Used to Extend Punishment Beyond the Statutory Maximum Are Generally Unconstitutional

Exactly one year later, Justice Souter wrote for the 5-4 majority in *Jones v. United States*,¹²⁵ and limited the holding in *Almendarez-Torres* to instances where recidivism is used as a sentencing factor.¹²⁶ In *Jones*, the defendant was found guilty of carjacking and faced a statutory maximum of fifteen years in prison for this crime.¹²⁷ However, if a judge found by a preponderance of the evidence that the defendant acted with the intent to do serious bodily harm to the victims or cause death, the sentence could be enhanced to a statutory maximum of twenty-five years in prison.¹²⁸ The defendant argued that intent to do serious bodily harm was really an element of the crime, rather than a sentencing factor.¹²⁹

As in *Almendarez-Torres* and *McMillan*,¹³⁰ the Court began its analysis by asking whether Congress intended for intent to do serious bodily harm to be a sentencing factor or an element of the offense.¹³¹ The Court found it was questionable what Congress had intended, and that it was uncertain that the “steeply higher penalties” faced for acting with the intent to injure or cause death were meant to be determined without the beyond a reasonable doubt safeguard.¹³² Based on this analysis, the Court determined that the statute’s text was an unreliable guide.¹³³ Next, following the methodology used in *Almendarez-Torres*, the Court looked at historical practice to see

123. *Id.* at 246 (comparing *McMillan*, 477 U.S. at 86-87, 89-90).

124. *See id.* at 246-47. The Court acknowledged that it expressed no opinion in *Almendarez-Torres* whether a higher level of proof might be required in other instances where finding the existence of particular conduct significantly increases the severity of sentence. *Id.* at 248.

125. *Jones v. United States*, 526 U.S. 227, 229 (1999). Justice Souter was joined by Stevens, J., Scalia, J., Thomas, J., and Ginsburg, J.. *Id.* The dissent was written by Kennedy, J., and joined by Rehnquist, C.J., O’Connor, J., and Breyer, J.. *Id.*

126. *See generally id.* at 235-44 (discussing how historically the factor “serious bodily injury” is an element of the crime and that only recidivism has been allowed to increase a penalty beyond the statutory maximum).

127. *Id.* at 230.

128. *Id.* at 230-31.

129. *Id.* at 231.

130. *See* notes 84-124 and accompanying text.

131. *Jones*, 526 U.S. at 232-33.

132. *Id.* at 233.

133. *Id.*

whether intent to commit bodily harm or cause death had traditionally been used as a sentencing factor, like recidivism.¹³⁴ In *Jones*, the Court found that historically intent to cause harm or death had been an element in aggravated offenses, and thus it was likely that Congress intended for this factor to be a separate offense proved beyond a reasonable doubt.¹³⁵

The Court then analyzed *Winship*, *Mullaney*, *Patterson*, and *McMillan* in order to determine whether intent to cause harm or death was a sentencing factor.¹³⁶ First, Justice Souter noted that *Winship* and *Mullaney* directly went against finding for the Government because malice and intent have been an essential element of crimes since early common law, and hence must be proved beyond a reasonable doubt.¹³⁷ Based on *Mullaney*, states and Congress may not simply get around *Winship* by redefining elements of a crime as sentencing factors.¹³⁸

Next, the Court assessed the holding of *Patterson*.¹³⁹ It concluded that while a narrow reading of *Patterson* might only mean that states may not presume elements of crimes, *Patterson* actually stands for the broader rule that states are limited in how they can reallocate traditional burdens of proof.¹⁴⁰ *Patterson* means that states “lac[k] the discretion to omit ‘traditional’ elements from the definition of crimes” and cannot “require the accused to disprove such elements.”¹⁴¹

Third, although the Court did not use the five-factor *McMillan* test, it did focus on whether, in light of *McMillan*, the accused is entitled to a jury trial and beyond a reasonable doubt standard when a sentencing factor is used to greatly increase the severity of the crime.¹⁴² The Court looked at the Sixth Amendment and historical case law to determine which facts should go to a jury.¹⁴³ Rather than risk diminishing the role of the jury, the Court concluded that facts that greatly increase an accused’s sentence should not

134. *Id.* at 234-35.

135. *Id.* at 235. The Court noted that carjacking is a form of robbery and that intent to cause harm or death has historically been an element of aggravated robbery. *Id.* Furthermore, even if Congress meant for serious bodily harm to be construed as a sentencing factor, the Court relied on the principle that “where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.” *Id.* at 239 (citations omitted).

136. *Id.* at 240-42.

137. *Id.* at 240-41.

138. *Id.* at 241 (citing *Mullaney*, 421 U.S. at 698).

139. *Id.* at 241-43.

140. *Id.* at 243.

141. *Id.* at 241-42.

142. *Id.* at 242-44.

143. *Id.* at 242-48.

go to a judge.¹⁴⁴ Lastly, Justice Souter decided that although read broadly *Almendarez-Torres*' holding means that, "not every fact expanding a penalty range must be stated in a felony indictment, . . ." it should be limited as an exception that applies only when recidivism is a sentencing factor.¹⁴⁵

III. STATEMENT OF THE FACTS

On December 22, 1994, at 2:04 a.m., Charles C. Apprendi fired eight .22 caliber rifle shots into the home of Michael and Mattie Fowlkes and their three children.¹⁴⁶ Bullets shattered the glass pane of the front door, and broke windows, with one of the bullets lodging in their daughter's bedroom.¹⁴⁷ He also used two black Santa Claus decorations hanging on the door as targets.¹⁴⁸ The Fowlkes were the only African-Americans living in an all-white neighborhood, in Vineland, New Jersey.¹⁴⁹ Twenty minutes later, Apprendi was arrested and immediately confessed that he had fired the shots.¹⁵⁰ After approximately three hours of intense interrogation, from 3:05 a.m. until 6:04 a.m.,¹⁵¹ he admitted that "he does not know the . . . victims or the family, but because they are black in color he does not want them in the

144. *Id.* at 248.

145. *Id.* at 248-49 (finding that there is an exception for recidivism because it is one of the most traditional sentencing factors).

146. *Apprendi v. New Jersey*, 530 U.S. 469 (2000); see also Melanie Burney, *Beyond a Reasonable Doubt? Court to Consider Whether Judge Should Have Added Punishment*, ABC NEWS.COM (Mar. 28, 2000), at http://www.abcnews.go.com/sections/us/DailyNews/scotus_hatcrimes000328.html; *New Jersey v. Apprendi*, 731 A.2d 485, 486 (N.J. 1999), *rev'd*, 530 U.S. 466 (2000); Resp't Brief at 5, *available at* LEXIS 1999 U.S. Briefs 478; *infra* note 382 (giving details about the impact Apprendi's crimes had on Mattie and her family. Mattie subsequently divorced Michael and currently goes by her maiden name, Harrell).

Apprendi and the Fowlkes were neighbors. New Jersey v. Apprendi, 698 A.2d 1265, 1266 (N.J. Super. Ct. App. Div. 1997), *rev'd*, 530 U.S. 466 (2000). On two other occasions in 1994, Apprendi fired a rifle at the Fowlkes' house. *Id.* The first incident occurred on September 24, 1994, where Apprendi shot at the bedroom of one of the children. *Id.*; see also *Apprendi*, 731 A.2d at 486. On the second occasion, in November 1994, shots were fired at the exterior of the house. *Apprendi*, 698 A.2d at 1266; see also 731 A.2d at 486.

147. Resp't Brief at 5.

148. *Id.* at 3.

149. *Apprendi*, 731 A.2d at 486.

150. Christopher Mumma, *N.J. Law On Hate Crimes Squashed Juries, Not Judges, Should Have Power*, REC. N. N.J., June 27, 2000, at A1, *available at* 2000 WL 15820550; see also Pet. Brief at 6, *available at* LEXIS 1999 U.S. Briefs 478 (stating Apprendi confessed to firing approximately four or five rounds at the house).

151. See Pet. Brief at 6-7; see also *Apprendi*, 530 U.S. at 469. Apprendi maintained that:

[T]he interrogating officer first mentioned race during the interrogation and that he gave a false confession to the officer because he was irrational and scared. He testified that the interrogating officer tried to intimidate him by telling him that there were "a lot of homosexuals and AIDS in jail" and a large prison population of blacks who would assault him when they discovered the nature of his crime. Petitioner testified that the officer promised that if he (Apprendi) cooperated, the officer would try to make it easier on him. As to the shooting, Mr. Apprendi testified that he fired at his neighbors' front door because the glass and purple door attracted his attention, sparking an urge to destroy it.

neighborhood”¹⁵² Apprendi further stated that he knew they were black, hoped to frighten them into moving,¹⁵³ and that he wanted to “‘just giv[e] them a message that they were in his neighborhood.’”¹⁵⁴ However, Apprendi later recanted his statement and said he lied to the police because he was mentally disturbed, scared, and irritated.¹⁵⁵ While staying in a halfway house in Camden, New Jersey, waiting for the Supreme Court to hear his appeal, he reflected that, “‘[i]t was just criminal mischief. That’s all it was. I had no idea it was a black family’s home. . . . In a rational state of mind and unimpaired I would have never thought of shooting in someone’s house.’”¹⁵⁶ Throughout the trial, Apprendi, a pharmacist, maintained that he shot at the Fowlkes’ front door because the “‘glass and the purple door”” caught his eye, while under the influence of drugs and mental disorders.¹⁵⁷

A grand jury indicted Apprendi and the defendant entered into a plea agreement with the prosecution,¹⁵⁸ where he pled guilty to two second-degree counts (three and eighteen) for possession of a firearm for an unlawful purpose and on one third-degree count (twenty-two) for possession of an antipersonnel bomb.¹⁵⁹ Under the second-degree counts, Apprendi could be sentenced between five to ten years, and the third-degree count of three to five years would run concurrently with the second-degree penalty.¹⁶⁰ However, the State of New Jersey reserved the right under its hate crime statute to enhance the second-degree statutory maximum of ten years, if the judge found by a preponderance of the evidence that Apprendi committed

Pet. Brief at 7 (citations omitted).

152. *Apprendi*, 731 A.2d at 486 (alteration in original).

153. Daniel M. Levy, *Hate Crime Laws: Cure or Placebo?*, 79 MICH. B. J. 674, 678 (2000).

154. *Apprendi*, 731 A.2d at 486.

155. *Apprendi*, 698 A.2d at 1267. A psychologist testified that Apprendi suffered from cyclothymic disorder (excessive mood swings), obsessive-compulsive disorder, kleptomania, drug dependence, alcohol abuse, and premature ejaculation. *Id.* The psychologist concluded that a person with this personality type would “say or do almost anything, including lie, to get out of a police interrogation.” *Id.* Apprendi testified that he lied to the police because they were threatening him and he just wanted to get away from the interrogation. *Id.*

156. Melanie Burney, *Beyond a Reasonable Doubt? Court to Consider Whether Judge Should Have Added Punishment*, ABC NEWS.COM (Mar. 28, 2000), at http://www.abcnews.go.com/sections/us/DailyNews/scotus_hatecrimes000328.html.

157. *Apprendi*, 698 A.2d at 1267.

158. *Apprendi*, 530 U.S. at 469 (finding that the grand jury originally indicted Apprendi on twenty-three counts, and none of them mentioned the hate crime statute or that Apprendi was racially biased).

159. *Id.*

160. *Id.* Apprendi was sentenced on count eighteen to twelve years imprisonment, with four years of parole ineligibility, on count three to a concurrent term of seven years in jail, and on count twenty-two to a concurrent sentence of three years. *Apprendi*, 698 A.2d at 1267. Additionally, Apprendi had to pay \$1,980 to the victim, \$100 to the Violent Crimes Compensation Board and a penalty of \$75 under the Safe Street Act. *Id.*

the crime with a biased purpose.¹⁶¹ Thus, if the judge found Apprendi guilty of a hate crime by a preponderance of the evidence, the defendant could be subjected to a maximum penalty of twenty years instead of just ten years imprisonment.¹⁶²

In order to prove the absence of hate in the defendant's heart, the defense lawyer brought in evidence of Apprendi's close personal associations.¹⁶³ He introduced affidavits under oath of several African-Americans who had known Apprendi for three years, and all the way "back to when he was a baby."¹⁶⁴ These witnesses swore they had been in the family home and socialized with Apprendi on numerous occasions and had never seen any racially biased behavior.¹⁶⁵ The group regularly went bowling together, got drinks and food afterwards, and Apprendi invited one of the men to his house for Super Bowl parties.¹⁶⁶ Apprendi took the stand and testified, "my 40 years of life is my proof that racism is not a part of my life. I've interacted with - with black people, Puerto Rican people. You know, anything, everybody. I have never had a problem."¹⁶⁷

Despite testimony from personal friends who had known Apprendi his whole life, the sentencing judge thought he was in the best position to determine whether the act of shooting was motivated by racial hate.¹⁶⁸ The judge by himself concluded there was racial bias by a mere preponderance of the evidence, and extended Apprendi's jail sentence beyond the statutory maximum he could have received had there been no hate crime.¹⁶⁹ Ultimately, the judge concluded Apprendi had acted with biased hatred and

161. *Apprendi*, 530 U.S. at 469-70. Historically, "New Jersey was one of the first states to adopt a hate crime law, in 1981. It bans acts of racial or ethnic intimidations, such as burning crosses or painting swastikas." *Supreme Court to Hear Arguments on Hate Crimes New Jersey Man Claims Law Unconstitutional*, CNN.com, March 27, 2000, at <http://www.cnn.com/2000/US/03/27/scotus.hate.02/index.html>. New Jersey expanded its law in 1990 to provide harsher penalties in assault and harassment crimes if prejudice played a role in picking the victim. *Id.*

162. *Apprendi*, 530 U.S. at 469-70.

163. Corry, *supra* note 15, at 482.

164. *Id.* (quoting Transcript of Motion and Sentencing at 44-45, *Apprendi* (No. 99-478)).

165. *Id.*

166. *Id.*

167. *Id.* at 483 (quoting Transcript of Motion and Sentencing at 66, *Apprendi* (No. 99-478)).

168. *Id.* The Honorable Rushton H. Ridgeway stated that Apprendi acted with the mental intent of racial hate because:

[P]ersons who have racial bias don't wear that bias as a badge of honor. I mean, the remarks that people make of that nature - those remarks are protected by the First Amendment - usually are done behind closed doors. And people just don't take action on those [sic] bias. So that these people who submit these letters don't know obviously, what has gone on in the mind of the defendant.

Id. (alteration in original). Furthermore, the judge "'had difficulty believing that [petitioner] was attracted to [the Fowlkes' front] door by the color. And that something went off in his . . . intoxicated state of mind that he wanted to destroy the door.'" Resp't Brief at 7 (alteration in original).

169. Corry, *supra* note 15, at 483-84.

sentenced him to twelve years imprisonment, which was two years beyond the statutory maximum on count eighteen.¹⁷⁰

IV. THE COURT OPINIONS

A. Justice Stevens' Majority Opinion: The Court Rejects the Use of the McMillan Five-Factor Test and Concludes that any Fact, other than Recidivism, that Increases a Sentence Beyond the Statutory Maximum is an Element of the Crime¹⁷¹

Since the Supreme Court's decision in *In re Winship*,¹⁷² the Court has struggled with "analytical tensions" in criminal sentencing.¹⁷³ This struggle involves balancing the principles of *Mullaney* and *Winship* with those of *Patterson* and *McMillan* in order to determine whether a fact is an element of the crime or a sentencing factor.¹⁷⁴ On the one hand the Court has "rejected the claim that whenever a State links the 'severity of punishment' to 'the presence or absence of an identified fact' the State must prove that fact beyond a reasonable doubt,"¹⁷⁵ but on the other hand has endorsed the proposition that "[t]he Due Process Clause protects the accused against

170. *Apprendi*, 530 U.S. at 471.

171. The majority opinion in *Apprendi* was written by Justice John Paul Stevens, who is perhaps the most liberal member of the Court. Frank J. Murray, *Supreme Court: Only Jury May Decide Crime Was Motivated By Hatred*, WASH. TIMES, June 27, 2000, at A13; see also *Apprendi*, 530 U.S. at 468. He was joined by Justices Clarence Thomas, Antonin Scalia, David H. Souter and Ruth Bader Ginsburg, "a quartet rarely in agreement on any 5-4 split." Murray, *supra* at A13; see also *Apprendi*, 530 U.S. at 468. A similar split in the Court was seen in *Jones* and *Almendarez-Torres*. *Almendarez-Torres v. United States*, 523 U.S. 224, 226 (1998); see also *Jones v. United States*, 526 U.S. 227, 229 (1999). In *Jones* and *Apprendi*, the "razor slim" majority vote was possible because Justice Thomas was the swing vote. See Knoll & Singer, *supra* note 5, at 1118.

172. 397 U.S. 358 (1970).

173. *Apprendi*, 530 U.S. at 474. There is tension in the criminal judicial system because while it is important to limit the judge's discretion in order to protect the defendant's rights, judges have historically had wide discretion to determine the appropriate sentence for a convicted defendant. See Benjamin J. Priester, Note, *Further Developments on Previous Symposia: Sentenced for a "Crime" the Government Did Not Prove: Jones v. United States and the Constitutional Limitations on Factfinding by Sentencing Factors Rather Than Elements of the Offense*, 61 LAW & CONTEMP. PROBS. Autumn 1998 No. 4, at 249, 251. Priester found that although these tensions are unresolved, *Jones* indicated that the trend is towards protecting criminal defendants and using the beyond a reasonable doubt standard. See *id.* at 249, 297-98.

174. See *Apprendi*, 530 U.S. at 474; see also Knoll & Singer, *supra* note 5, at 1058-61 (noting that twelve years after *In re Winship* there has been a revolutionary change in the way facts are used to sentence defendants and the Court needs to clarify the limits).

175. *McMillan*, 477 U.S. at 84 (quoting *Patterson*, 432 U.S. at 214).

conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”¹⁷⁶

On June 26, 2000, the Supreme Court attempted to better define the constitutional boundaries for sentencing factors in *Apprendi v. New Jersey* and reinforce criminal rights by holding that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”¹⁷⁷ Justice Stevens held that determining the existence of hate motive is an element of the crime and must be proven by a jury beyond a reasonable doubt whenever it is used to extend a defendant’s sentence beyond the statutory maximum.¹⁷⁸ The Court also concluded that any sentencing factor that extends the penalty beyond the statutory maximum is really an element of the crime, and therefore must be submitted to a jury and found beyond a reasonable doubt standard.¹⁷⁹

The holding is well supported, because the majority relies heavily on a detailed historical analysis that begins in the 1700s and ends with the Court’s decision in *Jones*.¹⁸⁰ History demonstrates that the length of sentence may not be extended beyond the statutory maximum merely upon a judicial finding of fact based upon a preponderance of the evidence.¹⁸¹ Justice Stevens observed that although judges have wide discretion in sentencing convicted defendants, this discretion has historically been limited within a range proscribed by statute.¹⁸² This observation is reinforced by the notion that since *Winship*, the Court has “made clear beyond peradventure that *Winship*’s due process and associated jury protections extend, to some degree, ‘to determinations that [go] not to a defendant’s guilt or innocence, but simply to the length of his sentence.’”¹⁸³ Thus, the judge’s discretion is

176. *In re Winship*, 397 U.S. 358, 364 (1970).

177. *Apprendi*, 530 U.S. at 490. The Court noted that just last year in *Jones*, it had “serious doubt concerning the constitutionality of allowing penalty-enhancing findings to be determined by a judge by a preponderance of the evidence . . .” *Id.* at 472. “*Apprendi* for the first time specifically applied the principles recognized in *Jones* and *Almendarez-Torres* to state prosecutions.” *People v. Lathon*, 740 N.E.2d 377, 380 (Ill. App. Ct. 2000) (citing *Apprendi*, 530 U.S. at 476-77).

178. *Apprendi*, 530 U.S. at 493-94 & n.19.

179. *Id.* at 494 & n.19.

180. *See id.* at 476-84.

181. *See id.* Justice Stevens found the principle that a trial by jury should be used to prove every accusation beyond a reasonable doubt has been a part of the common law for many centuries. *Id.* at 477 (citing 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540-41 (4th ed. 1873); 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769); C. MCCORMICK, EVIDENCE § 321, pp. 681-82 (1954)).

182. *See Apprendi*, 530 U.S. at 482-83. Justice Stevens quoted KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 9 (1998), which is cited in the dissent, for the proposition that “[f]rom the beginning of the Republic, federal judges were entrusted with wide sentencing discretion . . . , permitting the sentencing judge to impose any term of imprisonment and any fine up to the statutory maximum.” *Id.* at 482 n.9.

183. *Id.* at 484 (quoting *Almendarez-Torres*, 523 U.S. at 251 (Scalia, J., dissenting)). The majority noted that this was the essential lesson to be drawn from *Mullaney v. Wilbur*, 421 U.S. 684, 697-98 (1975). *Id.* at 485. *Mullaney* stands for the proposition that a state cannot circumvent the

bound by the key facts (elements) found beyond a reasonable doubt by the jury, and the judge may not extend the sentence beyond the statutory maximum.¹⁸⁴

The Court primarily used the historical analysis section to examine its most important cases dealing with standards of proof in a criminal trial which includes: *Winship*,¹⁸⁵ *Mullaney*,¹⁸⁶ *Patterson*,¹⁸⁷ *McMillan*,¹⁸⁸ *Almendarez-Torres*,¹⁸⁹ and *Jones*.¹⁹⁰ After synthesizing these holdings, it appeared that the Court has never “budge[d] from the position that (1) constitutional limits exist to States’ authority to define away facts necessary to constitute a criminal offense, and (2) that a state scheme that keeps from the jury facts that ‘expos[e] [defendants] to greater or additional punishment,’ may raise serious constitutional concern.”¹⁹¹ The Court explained,

[i]n sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*. Other than the fact of a prior conviction, any

beyond a reasonable doubt requirements of *Winship* “merely by ‘redefin[ing] the elements’” of a crime as sentencing factors. *Id.* (alteration in original) (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 697-98). The majority rebutted the dissent’s notion that *Patterson v. New York* limited this aspect of *Mullaney*. *Id.* at 485 n.12. Although *Patterson* provided the legislature with discretion in defining the elements of crimes, the Court made clear that states may not reallocate burdens of proof merely by labeling an element a sentencing factor. *Id.*

184. *See id.* at 482-84 (determining *Winship* was the first time beyond a reasonable doubt was actually held to be the proper standard, and that *Winship* solidified this standard as a requirement in our criminal justice system).

185. *See id.* at 483; *see also supra* notes 29-58 and accompanying text.

186. *See Apprendi*, 530 U.S. at 483-84; *see also supra* notes 59-72 and accompanying text.

187. *See Apprendi*, 530 U.S. at 484-85; *see also supra* notes 73-83 and accompanying text.

188. *See Apprendi*, 530 U.S. at 485-86; *see also supra* notes 84-96 and accompanying text.

189. *See Apprendi*, 530 U.S. at 485-87; *see also supra* notes 97-124 and accompanying text.

190. *See Apprendi*, 530 U.S. at 487-88; *see also supra* notes 125-145 and accompanying text.

191. *Apprendi*, 530 U.S. at 486 (quoting *McMillan*, 477 U.S. 79, 85-88 (1986)). A common thread throughout all of these cases with the limited exception of *Almendarez-Torres*, is that the judge has always increased the defendant’s sentence within the statutory maximum. *See id.* at 487-88. In *Almendarez-Torres*, the Court found it was constitutional for the judge to extend the defendant’s sentence beyond the statutory maximum based on a finding of the fact of recidivism. *Id.* at 488. However, the holding in *Jones* made it “crystal clear” that the conclusion in *Almendarez-Torres* “turned heavily upon the fact that” recidivism is one of the most traditional basis for increasing an offender’s sentence, and the defendant actually *admitted* he had committed the previous crimes. *Id.* at 488. The majority countered the dissent’s argument that *Almendarez-Torres* is proof that judges should be allowed to extend sentences beyond the statutory range by stating that the case “simply cannot bear [the dissent’s] broad reading” and is limited to cases involving recidivism. *Id.* at 488 n.14, 533-35 (O’Connor, J., dissenting) (arguing *Almendarez-Torres* is not an exception, and in *Almendarez-Torres* the Court held that judges may extend the sentence beyond the statutory maximum).

fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.¹⁹²

Additionally, “[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.”¹⁹³ This rule is narrowly interpreted in *Apprendi* because it is only applied to a statute that extended the sentence beyond the statutory maximum.¹⁹⁴ Therefore, sentencing factors are constitutional and may be found by a judge by a preponderance of the evidence when they affect the defendant’s length of conviction *within the stated statutory range*.¹⁹⁵

Next, the majority clarified when it is appropriate to use the *McMillan* five-factor test to determine if the state’s sentencing scheme is

192. *Apprendi*, 530 U.S. at 490.

193. *Id.*

194. *See id.* at 481-82. The majority quickly dismissed the dissent’s accusation that its holding has the broad effect of invalidating the current capital punishment and federal Sentencing Guideline procedures. *See id.* at 497 & n.21. *But cf. Apprendi*, 530 U.S. at 535-52, 539-52 (O’Connor, J., dissenting) (arguing strongly that the majority has invalidated the capital punishment system and federal Sentencing Guidelines).

However, the majority narrowly construed its holding and found it is still constitutional for judges to use sentencing factors and determine whether a defendant is to receive the death penalty or a life sentence. *See id.* at 495-97. Justice Stevens, approved of this capital punishment procedure because he concluded that,

[w]hat the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed. . . . The person who is charged with actions that expose him to the death penalty has an absolute entitlement to jury trial on all the elements of the charge.

Id. at 497 (quoting *Almendarez-Torres*, 523 U.S. 244, 257 n.2 (1998) (Scalia, J., dissenting) (emphasis deleted)). Therefore, it is constitutional for the judge to impose the death penalty because the jury made the initial findings that will expose the defendant to the death penalty beyond a reasonable doubt. *See id.* Furthermore, the capital punishment system is constitutional because the judge is still operating within the statutory range, *i.e.*, the judge can impose any sentence ranging from life imprisonment to the death penalty. *See id.* Additionally, Justice Stevens dismissed the argument that the majority had overruled the federal Sentencing Guidelines because the Guidelines were not before the Court and hence, no view was expressed on the subject. *Id.* at 497 n.21.

195. *See id.* at 481-82. Justice Stevens upheld sentencing factors in general because he stated that, nothing . . . suggests that it is impermissible for judges to exercise discretion - taking into consideration various factors relating both to the offense and offender - in imposing a judgment *within the range* prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits*

Id. But cf. Apprendi, 530 U.S. at 533 (O’Connor, J., dissenting) (arguing that the majority in effect has declared all sentencing factors to be unconstitutional because the majority stated it is unconstitutional to remove from the jury facts “that increase the prescribed range of penalties to which a criminal defendant is exposed” (quotation omitted)).

unconstitutional.¹⁹⁶ The *McMillan* five-factor test cannot be used when the judge extends a sentence beyond the statutory maximum, and thus, *McMillan* may only be applied when a judge is extending the conviction within the stated statutory range.¹⁹⁷ Because the judge in *Apprendi* increased the defendant's sentence beyond the statutory maximum, the *McMillan* test was not used to determine whether hate motive was an element or sentencing factor.¹⁹⁸ In cases where the sentence is extended beyond the statutory maximum, the proper test is, "does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"¹⁹⁹ If it does, then the fact being used to extend the defendant's conviction beyond the statutory maximum is an element of a crime that must be proved to a jury beyond a reasonable doubt.²⁰⁰ Therefore, a sentencing factor is a fact that lengthens or mitigates a conviction *within the statutory range*, while any fact that increases the conviction beyond the statutory maximum is an element of a crime.²⁰¹

Based on the Court's new test, the hate motive factor was held to be an element of a crime for two main reasons.²⁰² First, the hate motive is really an element of a crime because it was a fact that extended the defendant's conviction beyond the statutory maximum.²⁰³ Second, determining the presence of a "'purpose to intimidate' on account of, *inter alia*, race" goes to

196. *See id.* at 530 U.S. at 487 n.13. The sentencing scheme is unconstitutional when the state has taken an element of the crime that should be found by a jury beyond a reasonable doubt and defined it as a sentencing factor that is determined by a judge by a preponderance of the evidence. *See id.* at 484-488. Typically, the *McMillan* test is used to determine whether the fact used to extend the defendant's penalty is a sentencing factor or an element of the crime. *See id.*

197. *See id.* Although the dissent accused the majority of overruling *McMillan*, the majority stated that it merely limited the case to instances that "do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict - a limitation identified in the *McMillan* opinion itself." *Id.* at 487 n.13. The dissent argued that the *McMillan* five-factor test should be applied to determine whether a fact is an element or sentencing factor regardless of whether that fact is used to extend the penalty beyond the statutory maximum. *See id.* at 532-33, 551-53 (O'Connor, J., dissenting) (arguing that the "increase in the maximum penalty" rule that limited the use of the *McMillan* test was not required by the Constitution and should be rejected).

198. *Id.* at 494 & n.19 (finding that New Jersey's reliance on *McMillan* was misplaced and therefore, New Jersey could not use the *McMillan* test to determine whether hate motive was an element or sentencing factor).

199. *Id.* When a factor is used to extend the conviction beyond the statutory maximum, the *McMillan* five-factor test is not used. *See id.* Instead, one must ask what is the effect of the factor. *Id.* at 494. If the factor extends the conviction beyond the statutory maximum, then its effect is elemental in nature. *Id.* at 494 & n.19.

200. *Id.*

201. *Id.*

202. *Apprendi*, 530 U.S. at 494.

203. *Id.* at 494 & n.19.

the defendant's *mens rea* which is a clear-cut example of an element of a crime.²⁰⁴ Thus, the hate crime factor must be found by a jury of one's peers and established beyond a reasonable doubt if it increases the punishment beyond the statutory maximum.²⁰⁵

Essentially, these two conclusions mean that the Court held "it violates due process and the Sixth Amendment to convict a person of one crime, but punish him or her for another."²⁰⁶ "Apprendi was convicted of possession of a firearm for an unlawful purpose, but he was sentenced both for this crime and for the separate offense of having acted with an impermissible hate-based motive."²⁰⁷ In essence, the hate motive factor was a *separate crime* that must be found by a jury beyond a reasonable doubt.²⁰⁸ Therefore, any factor that extends the defendant's conviction beyond the statutory maximum will be found to be a separate offense or an element of a crime.²⁰⁹

B. Justice Scalia's Concurring Opinion: The Dissent is Overly Idealistic to Believe a Judge Can Accurately Find Facts by a Preponderance of the Evidence in all Situations

Justice Scalia wrote a short opinion and criticized the dissent for thinking that a governmental bureaucracy is capable of "perfect equity" when determining the proper sentence for a defendant.²¹⁰ The criminal

204. *Id.* at 492-93. The Court concluded that establishing a defendant's conscious objective was to intimidate a victim due to their race or other status-based characteristics is really an element of a crime because the defendant's state of mind must be closely examined. *Id.* at 493 & n.17. Acting with a hateful purpose goes to the defendant's *mens rea* or "criminal intent," which requires an examination of that person's mental state. *Id.*; see also *supra* note 15 (commenting it is a difficult and complex endeavor to prove existence of hatred); but cf. *infra* note 256 (noting the Court in *Wisconsin v. Mitchell*, 508 U.S. 476, 485 (1993), upheld hate motive as a sentencing factor). The *Apprendi* majority found that "Wisconsin's hate crime statute [in *Mitchell*], was in text and substance, different from New Jersey's . . ." *Apprendi*, 530 U.S. at 493 n.18. Also, *Mitchell* never addressed whether Wisconsin's hate crime requirement was an element or sentencing factor. *Id.* Furthermore, the New Jersey Supreme Court's characterization of the particular hate crime statute in *Apprendi* as a sentencing factor going to the defendant's motive, rather than a *mens rea* element, could not "change the nature of the conduct actually targeted" by the statute. *Id.* The Court concluded that the New Jersey statute used the language "purpose to intimidate," and that this language "[b]y its very terms . . . mandate[d] an examination of the defendant's state of mind" *Id.* at 492.

205. *Id.* at 494.

206. Chemerinsky, *supra* note 14, at 520.

207. *Id.* at 520-21

208. *Id.* at 521

209. *Id.*

210. *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring). Justice Scalia criticized Justice Breyer's dissent. *Id.* He believes Justice Breyer describes a criminal system that is totally run by judges, which contradicts the system envisioned by the Founding Fathers of the American Republic. *Id.* at 499. The founders sought to leave criminal justice to the people in the form of juries. *Id.* Furthermore, they were in agreement on this point because the guaranteed right to a jury-trial "was one of the least controversial provisions of the Bill of Rights." *Id.*

justice system should appear fair to the American people, which means that "the criminal will never get *more* punishment than he bargained for when he did the crime, and his guilt of the crime (and hence the length of the sentence to which he is exposed) will be determined *beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens*."²¹¹ The dissent's opinion "proceed[ed] on the erroneous and all-too-common assumption that the Constitution means what we think it ought to mean. It does not; it means what it says."²¹² Thus, because the Constitution literally requires due process of law, this mandates that a jury must find beyond a reasonable doubt *all* facts bearing on punishment.²¹³

*C. Justice Thomas' Concurrence: The Court Should Adopt an Even Broader Rule that Makes More Facts Elements of the Crime*²¹⁴

Justice Thomas defined the issue in *Apprendi* as the "seemingly simple question of what constitutes a 'crime.'"²¹⁵ The answer to this question is found in the way one determines "which facts constitute the 'crime' - that is, which facts are the 'elements' or 'ingredients' of a crime."²¹⁶ Once something is found to be a crime, the Constitution guarantees that the following rights attach:

the "accused" has the right (1) "to be informed of the nature and cause of the accusation" (that is, the basis on which he is accused of a crime), (2) to be "held to answer for a capital, or otherwise infamous crime" only on an indictment or presentment of a grand jury, and (3) to be tried by "an impartial jury of the State and district wherein the crime shall have been committed."²¹⁷ "Thus it is critical

211. *Id.* Justice Scalia argued it is unfair to the criminal defendant's and society's expectations to say that the statutory maximum for a particular crime is thirty years; and then allow a judge to extend this conviction beyond the stated maximum penalty. *Id.*

212. *Apprendi*, 530 U.S. at 499.

213. *Id.* The Constitution guarantees that "in all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury." *Id.* This statement "has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury." *Id.*

214. Justice Scalia joined Parts I and II of Justice Thomas' concurrence. *Id.* at 499 (Thomas, J., concurring).

215. *Id.*

216. *Id.* at 500.

217. *Id.* at 499 (quoting U.S. CONST. amends. V, VI).

to know which facts are elements” of the crime because all of these constitutional rights attach.²¹⁸

Justice Thomas noted that the question of which facts are elements becomes more difficult and complicated to answer after the Court’s decision in *McMillan* created the idea of the sentencing enhancement (or sentencing factor).²¹⁹ Although the term “sentencing enhancement” is relatively new, Courts have long had to ask which facts are elements of the crime and then answer this question by granting the criminal defendant the aforementioned constitutional rights.²²⁰ This historical practice is crucial, because it demonstrates there is a “long line of essentially uniform authority . . . stretching from the earliest reported cases after the founding until well into the 20th century” that proves “the original understanding of which facts are elements was even broader than the rule the Court adopt[ed].”²²¹ Therefore, historically, criminal defendants were granted greater constitutional protection because more facts were considered elements of the crime that had to be proved to a jury beyond a reasonable doubt.²²²

Justice Thomas analyzed much of the same case history used by the majority and concluded that the *McMillan* factor analysis should be thrown out because it has complicated the Court’s due process analysis.²²³ The five-factor test should be discontinued and the Court should adopt an even broader rule than the one adopted by the *Apprendi* majority.²²⁴ The result of Justice Thomas’ ruling is that more facts will be found to be elements of crimes.²²⁵ Justice Thomas urged the Court to adopt the rule that every fact which increases the length of punishment is an element of the crime, including recidivism.²²⁶ Therefore, Justice Thomas concluded that the

218. *Id.* at 500.

219. *Id.* Facts known as sentencing enhancements increase the defendant’s punishment, but are not subjected to the constitutional protections which elements receive. *Id.*; see also *supra* note 37 (describing the different constitutional protections).

220. *Apprendi*, 530 U.S. at 500.

221. *Id.* at 501.

222. See generally *id.* at 500-18. Justice Thomas cited numerous historical cases dealing with larceny, burglary, and recidivism, as well as an 1872 treatise as evidence that traditionally, any fact that increased punishment was considered an element of the crime. *Id.* This understanding continued until the middle of the twentieth century. *Id.* at 518.

223. See *id.* at 501-02 (finding “[n]o multi-factor parsing of statutes” is necessary).

224. *Id.* at 499-503.

225. See *id.*

226. *Id.* at 505-07. The Justice found substantial evidence for the rule that “a crime includes every fact that is by law a basis for imposing or increasing punishment . . .” *Id.* at 506. Historically, courts considered recidivism to be an element of the crime because a crime “includes any fact to which punishment attaches.” *Id.* at 515-16.

Additionally, for Justice Thomas’ broad rule, it is irrelevant “whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender’s sentence.” *Id.* at 520. Justice Thomas admitted this was an error he made in deciding *Almendarez-Torres*. *Id.* To avoid this error, the rule he advocates is - if the fact increases the punishment, it is an element regardless of whether it has historically been a sentencing enhancement. *Id.* at 520-22.

majority's rule, while not as broad as it should be, marks a return to the original understanding of the Fifth and Sixth Amendments.²²⁷

*D. Justice O'Connor's Dissent*²²⁸

1. The Court's Rejection of the *McMillan* Five-Factor Test Represents a Substantial Change in the Court's Due Process Jurisprudence

Unlike the concurrence and majority that believe *Apprendi* marks a return to a traditional understanding of how criminal defendants are sentenced, Justice O'Connor immediately declared this a "watershed change in constitutional law."²²⁹ She began her discussion by noting that the Court "has long recognized that not every fact that bears on a defendant's punishment need be charged in an indictment, submitted to a jury, and proved by the government beyond a reasonable doubt."²³⁰ Rather, the "legislature's definition of the elements of the offense is usually dispositive."²³¹ Additionally, the Court has never established a bright-line rule to determine whether a fact is an element.²³² Therefore, the Court should continue to answer this question by using a case-by-case *McMillan* five-factor analysis, regardless of whether the fact is used to increase the statutory maximum.²³³

Justice O'Connor believes that the majority misreads the historical cases and treats it as cited and that this authority does not mandate the majority's statutory maximum rule.²³⁴ She divided the majority's case history into two categories.²³⁵ The first involved evidence that judges at common law had little discretion in how to sentence defendants and second, that the

227. *Id.* at 518.

228. Chief Justice Rehnquist, Justice Kennedy and Justice Breyer joined the dissent. *Id.* at 523 (O'Connor, J., dissenting).

229. *Id.* at 524.

230. *Id.*

231. *Id.* Justice O'Connor recognized that the states are bound by the constitutional limits set forth in cases like *Winship*, and *McMillan*. *Id.*

232. *Id.*

233. *See id.* at 524-25.

234. *Id.* at 525-26. She quoted Justice Stevens' rule and set forth the majority's rule that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 525. Justice O'Connor countered that the majority could not "identify a single instance" since the ratification of the Bill of Rights over two hundred years ago that mandated adoption of this rule. *Id.*

235. *Id.*

government must prove at trial all the elements of a crime.²³⁶ Justice O'Connor dismissed these findings because in the first category, the majority itself actually rejected the relevance of this historical practice because of conflicting evidence that judges in America have had wide discretion in sentencing defendants.²³⁷ As to the second category of evidence, this says nothing about whether a fact that extends a defendant's punishment beyond the statutory maximum should be treated as an element of the crime.²³⁸ For Justice O'Connor, the real issue in *Apprendi* "concern[ed] the distinct question of when a fact that bears on a defendant's punishment, but which the legislature has not classified as an element . . . , must nevertheless be treated as an offense element."²³⁹

In order to resolve this issue, Justice O'Connor looked at many of the same important cases dealing with due process as the majority.²⁴⁰ The Justice relied heavily on *Patterson*, which she believes answers the question in *Apprendi*.²⁴¹ In *Patterson* the Court declined to:

adopt as a constitutional imperative, operative countywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch.²⁴²

236. *Id.* She also challenged Justice Thomas' assumption that the case history demonstrates a broader rule is required that limits judges' discretion. *Id.* at 527-28. She contended that Justice Thomas erroneously concluded that the Fifth and Sixth Amendments "'codified' pre-existing common law." *Id.* at 527. Even assuming this assertion is correct, the case history actually fails to "demonstrate any settled understanding" as to what constituted an element of a crime. *Id.* at 527-28. Therefore, Justice Thomas' rule that any fact that increases the defendant's punishment is an element is not required by the Constitution. *Id.*

237. *Id.* at 525.

238. *See id.* at 526-27.

239. *Id.* at 527.

240. *See id.* at 530-37 (discussing primarily *Winship*, *Mullaney*, *Patterson*, *McMillan*, *Almendarez-Torres*, and *Jones*).

241. *See id.* at 530.

242. *Id.* (quoting *Patterson v. New York*, 432 U.S. 197, 210 (1977)); *see also supra* notes 73-86 and accompanying text. The dissent argued that the majority bases its opinion on *Mullaney*. *Apprendi*, 530 U.S. at 529-30. Justice O'Connor stated the majority cites *Mullaney* "to demonstrate the 'lesson' that due process and jury protections extend beyond those factual determinations that affect a defendant's guilt or innocence." *Id.*

The dissent then made the stretch that the majority requires *all* sentencing factors to be proven beyond a reasonable doubt to a jury. *See id.* at 530 (finding the majority would apply the beyond a reasonable doubt standard to all factual determinations that make a difference in the degree of punishment a defendant receives regardless of whether the factor is used to extend the conviction beyond the statutory maximum). Justice O'Connor reasoned that *Patterson* clearly rejected this broad application of *Mullaney's* due process requirements. *Id.* She then cites *Almendarez-Torres*

Based on this holding, legislatures have wide discretion in defining the elements of a crime, and a fact that increases the defendant's punishment beyond the statutory maximum is *not necessarily* an element of a crime.²⁴³

Next, Justice O'Connor accused the majority of overruling *McMillan* by declaring all sentencing factors unconstitutional.²⁴⁴ Sentencing factors are no longer constitutional because the majority declared that "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed . . . such facts must be established by proof beyond a reasonable doubt."²⁴⁵ While the majority stated its holding applies only to factors that increase the conviction beyond the statutory maximum,²⁴⁶ the dissent believes this really means "any fact that increases or alters the range of penalties to which a defendant is exposed - which, by definition, must include increases or alterations to either the minimum or maximum penalties - must be proved to a jury beyond a reasonable doubt."²⁴⁷ Therefore, Justice O'Connor believes that *McMillan* has effectively been overruled, because the majority's bright-line rule was rejected in *McMillan* where the Court held a case-by-case multi-factor analysis was to be used.²⁴⁸

where the Court explicitly limited *Mullaney's* holding. *Id.* at 532. The Court in *Almendarez-Torres* stated:

[*Mullaney*] suggests that Congress cannot permit judges to increase a sentence in light of recidivism, or any other factor, not set forth in an indictment and proved to a jury beyond a reasonable doubt. This Court's later case, *Patterson v. New York*, . . . however, makes absolutely clear that such a reading of *Mullaney* is wrong.

Id. (alteration in original) (quoting *Almendarez-Torres*, 523 U.S. at 240).

243. *Id.* It is unclear how the majority can announce the rule that any fact that increases a penalty beyond the statutory maximum must be proven to a jury beyond a reasonable doubt without overruling *Patterson*. See *id.* at 531. The dissent believes the majority's rule requires overruling *Patterson*, because *Patterson* clearly held that not every fact that extends a defendant's conviction need be defined as an element of a crime that must be proved beyond a reasonable doubt. *Id.* at 530-32. Furthermore, *McMillan* does not support the Court's bright-line "increase in the maximum penalty" rule. *Id.* at 533-34.

244. *Id.* at 533.

245. *Id.* (quoting *Jones v. United States*, 526 U.S. 227, 252-53 (1998)). Justice O'Connor challenged the majority to "admit that it is overruling *McMillan*" and "also to explain why such a course of action is appropriate under normal principles of *stare decisis*." *Id.*

246. See *supra* notes 193-198 and accompanying text.

247. *Apprendi*, 530 U.S. at 533 (emphasis in original).

248. *Id.* at 533-35. Justice O'Connor concluded that the majority actually draws support for its new bright-line rule from *McMillan* because in *McMillan*, the Court noted "petitioners' claim would have had 'at least more superficial appeal' if the firearm possession finding had exposed them to greater or additional punishment." *Id.* at 534 (quoting *McMillan*, 477 U.S. at 88 (discussing whether the sentencing factor creates a separate penalty or merely limits the judge's discretion to a penalty that is within the statutory range)). From this statement, the majority adopts the bright-line rule that a factor may not be used to extend the conviction beyond the statutory maximum. *Id.* at 533-34.

However, Justice O'Connor found this to be weak support for adopting a new bright-line rule

2. The Court Should Simply Apply the *McMillan* Factors to Determine Whether it is Permissible to Extend a Defendant's Punishment Beyond the Statutory Maximum

Since the majority's "increase in the maximum penalty" rule is not mandated by the Constitution and is a drastic departure from the Court's analysis in past cases, Justice O'Connor applied the *McMillan* factors to New Jersey's hate crime statute.²⁴⁹ First, the hate crime statute "does not shift the burden of proof on an essential ingredient of the offense by presuming that ingredient upon proof of other elements of the offense."²⁵⁰ "Second, the magnitude of the New Jersey sentence enhancement . . . is constitutionally permissible."²⁵¹ The weapons possession statute carries a penalty of five to ten years' imprisonment and the finding of the hate crime "exposed . . . [Apprendi] to a higher sentence range of 10 to 20 years' imprisonment."²⁵² However, a ten-year increase in the conviction "falls well within the range" the Court has found permissible.²⁵³ Third, the statute does not give the "impression of having been enacted to evade the constitutional requirements that attach when a State makes a fact an element of the charged offense."²⁵⁴ Fourth, New Jersey did not take what had in the past been an element of the weapons possession offense and turn that into a sentencing factor.²⁵⁵ Finally, "New Jersey 'simply took one factor that has always been considered by sentencing courts to bear on punishment' - a defendant's motive for committing the criminal offense - 'and dictated the precise weight to be given that factor' when the motive is to intimidate a person because of

because nowhere in *McMillan* is there any mention of such a rule. *Id.* at 533-35. Thus, from the dissent's perspective, whether a penalty is within the statutory range or extends the penalty beyond the statutory range is merely part of the traditional five-factor analysis. *See id.* at 535.

Justice O'Connor then reasoned that neither *Almendarez-Torres* nor *Jones* support the majority's bright-line rule. *Id.* at 535-36. She believes that in *Almendarez-Torres*, the Court explicitly held that judges could impose a sentence beyond the statutory maximum, as was seen when the Court upheld recidivism as a sentencing factor. *Id.* Justice O'Connor also concluded that *Jones* offers the *Apprendi* majority little support, because the *Jones* majority was unable to decide whether it was permissible for judges to increase the penalty beyond the statutory maximum. *Id.* at 535 (citing *Jones*, 526 U.S. at 248-49). Therefore, Justice O'Connor continues to agree with the dissenters in *Jones* that *Almendarez-Torres* in effect decided the issue and clearly rejected the bright-line rule the majority adopts in *Apprendi*. *Id.* at 535 (citing *Jones*, 268-70 (Kennedy, J., dissenting) (arguing that "[i]n *Almendarez-Torres*, we squarely rejected the petitioner's argument that 'any significant increase in a statutory maximum sentence would trigger a constitutional 'elements' requirement'")).

249. *Id.* at 552-54; *see also supra* notes 90-96 and accompanying text.

250. *Id.* at 552 (citing *McMillan*, 477 U.S. at 86-87; *Patterson*, 432 U.S. at 215).

251. *Id.*

252. *Id.*

253. *Id.* (citing *Almendarez-Torres*, 523 U.S. 224, 226, 242-43 (1998) where the Court upheld an eighteen-year enhancement to the defendant's sentence).

254. *Id.* at 552-53.

255. *Id.* at 553.

race.”²⁵⁶ Therefore, except for the hate motive factor and increase in the maximum statutory punishment, the New Jersey statute is exactly like those in *Almendarez-Torres* and *McMillan*.²⁵⁷ Based on the factor analysis, Justice O’Connor was not persuaded that New Jersey sought to evade constitutional requirements and would uphold the New Jersey sentencing scheme.²⁵⁸

*E. Justice Breyer’s Dissent: Legislatures Should Have Broad Flexibility to Define the Elements of Crimes and Use Sentencing Factors*²⁵⁹

Since judges have wide discretion to choose which facts they will use to enhance a defendant’s sentence, then it must also be permissible for legislatures to determine which sentencing factors will be used through a statute.²⁶⁰ Legislatures should have flexibility in choosing to make facts such as a hate motive sentencing factors because “the Constitution does not freeze 19th-century sentencing practices into permanent law.”²⁶¹ Given that legislatures retain the ability to experiment with new sentencing practices, it is puzzling why the Constitution would prohibit a legislature from enacting a statute where an increase in the maximum penalty is involved.²⁶²

Justice Breyer posited that the majority based its rule on two assumptions.²⁶³ The first was that the majority wants to limit legislatures’ broad authority to transform facts found by juries (elements of the offense) into sentencing factors determined by judges.²⁶⁴ The majority reiterated throughout its opinion that these limitations are a means of preventing states from “defin[ing] away facts necessary to constitute a criminal offense.”²⁶⁵

256. *Id.* (quoting *McMillan*, 477 U.S. at 89-90). Although the majority found that a purpose to intimidate based on race is part of the *mens rea* element, the dissent cited *Wisconsin v. Mitchell*, 508 U.S. 476, 485 (1993) where the Court unanimously upheld a hate crime statute as a sentencing factor based on the racial hate motive of the defendant. *Id.* In *Mitchell*, the Court explained that a defendant’s motive has traditionally been an important factor in sentencing and that this rationale applied to sentencing based on racial hate motive. *Id.* (citing *Mitchell*, 508 U.S. at 484-85). Therefore, the New Jersey statute passes *McMillan* because motive is a traditional sentencing factor, and the legislature has dictated the precise weight judges should give that factor. *Id.* at 553-54.

257. *Id.* at 552-53.

258. *Id.* at 552-54.

259. *Id.* at 555 (Breyer, J., dissenting). Chief Justice Rehnquist joined with Justice Breyer. *Id.*

260. *See id.* at 555-59. Traditionally, the Court has left legislatures the freedom to determine elements of crimes based on history, common-law tradition, and current social need. *Id.* at 559 (citing *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998); *McMillan*, 477 U.S. at 85).

261. *Id.* at 559.

262. *Id.* at 560-61.

263. *Id.* at 562.

264. *Id.*

265. *Id.* (quoting *ante*, at 486.)

However, the majority's rule does not provide the cure for this disease.²⁶⁶ The source of the problem is not that legislatures have the power to enact *sentencing factors*, but rather the problem stems from: "the traditional legislative power to select elements defining a crime, the traditional legislative power to set broad sentencing ranges, and the traditional judicial power to choose a sentence within that range on the basis of relevant offender conduct."²⁶⁷ Hence, the solution is to continue using the Sentencing Guidelines and allow legislatures to create sentencing rules that specify punishments based on the defendant's conduct and appropriate procedural due process protections.²⁶⁸

Justice Breyer argued that judges should be able to find sentencing factors, but suggested that rather than using a preponderance of the evidence standard, judges should determine sentencing facts beyond a reasonable doubt in criminal cases when there are unusual or serious procedural concerns.²⁶⁹ Therefore, legislatures should retain substantial latitude in defining sentencing factors, and instead of adopting the *Apprendi* rule, legislatures should use the Sentencing Guidelines and beyond a reasonable doubt standard to protect criminal defendants.²⁷⁰

The second justification the majority gave for its rule is that judges have traditionally determined "sentences *within* a legislated range capped by a maximum (a range that the legislature itself sets)."²⁷¹ However, Justice Breyer does not understand how this rule is particularly relevant to safeguarding criminal defendants' rights when the rule says nothing about mandatory minimum sentences. In practice, mandatory minimums are far more important to criminal defendants than statutory maximums because it makes a large difference in the severity of the sentence if the minimum is ten years or only one year in prison.²⁷² Furthermore, the Court's new rule upsets many states' statutes because up until *Apprendi*, their legislatures were led to

266. *Id.*

267. *Id.* at 562.

268. *Id.* at 562-63. Justice Breyer believes:

[T]he solution to the problem lies, not in prohibiting legislatures from enacting sentencing factors, but in sentencing rules that determine punishments on the basis of properly defined relevant conduct, with sensitivity to the need for procedural protections where sentencing factors are determined by a judge (for example, use of a "reasonable doubt" standard), and invocation of the Due Process Clause where the history of the crime at issue, together with the nature of the facts to be proved, reveals unusual and serious procedural unfairness.

Id.; see also Gerard E. Lynch, *Towards a Model Penal Code, Second (Federal?): The Challenge of the Special Part*, 2 BUFF. CRIM. L. REV. 297, 322 (1998) (recognizing that the problem is "identifying what factors are sufficiently important morally, and accordingly will have sufficiently serious sentencing consequences, that they ought to be included . . . as elements of offenses, and subject to the procedural safeguards traditionally attaching to such elements").

269. *Apprendi*, 520 U.S. at 562-63.

270. *Id.*

271. *Id.*

272. *Id.*

believe they could increase a statutory maximum based on sentencing factors.²⁷³ Thus, the *Apprendi* holding “creates serious uncertainty about the constitutionality of such statutes” and the legitimacy of those sentenced under them.²⁷⁴

V. IMPACT

A. Judicial

1. Justice O'Connor Predicts Shockwaves from *Apprendi* will be Felt For a Long Time Because Major Changes in State and Federal Sentencing Procedures are Required

Following *Apprendi*, much uncertainty remains in the area of defendant sentencing and Justice O'Connor predicts this ruling will have a grave impact on the criminal justice system.²⁷⁵ *Apprendi*'s attorney, Joseph D. O'Neill, estimates that “[t]he impact is grand because it changes the law in some 40 other states and the District of Columbia. It changes the way criminal law is practiced in this country.”²⁷⁶ Significantly, *Apprendi*'s holding threatens to upset current state sentencing schemes, procedures used in capital punishment cases,²⁷⁷ and likely invalidates the Sentencing Guidelines used by federal courts.²⁷⁸

a. Capital Punishment

Read broadly, the majority's rule that judges cannot extend a defendant's conviction beyond the statutory maximum likely invalidates the United States' capital punishment scheme, because in *Apprendi*, it was unconstitutional for a judge to extend a defendant's sentence by only two years.²⁷⁹ Analogously, it would be impermissible for a judge to use sentencing factors and extend an offender's penalty from life imprisonment

273. *Id.* at 564.

274. *Id.* at 565. For example, the majority did not discuss the impact their rule will have on drug offenses where quantity of drugs is a sentencing factor routinely used by judges under the Sentencing Guidelines. *Id.*

275. See *id.* at 535-52 (O'Connor, J., dissenting).

276. Murray, *supra* note 171, at A13.

277. *Apprendi*, 530 U.S. at 536-39, 544-47.

278. *Id.* at 549-52.

279. See *id.* at 536-37, 544.

to death because the “magnitude of punishment at stake” is greater than that in *Apprendi*.²⁸⁰

After a jury verdict, some jurisdictions use a judge rather than a jury to determine whether there are aggravating or mitigating factors that weigh in favor of life imprisonment or a death sentence.²⁸¹ Also, under several capital punishment schemes a judge may disregard a jury’s recommendation of life imprisonment and impose the death penalty.²⁸² Hence, in these jurisdictions the defendant can only be sentenced to death by a judge’s weighing of certain factors.²⁸³ Based on these sentencing procedures, Justice O’Connor reasons that:

280. See *id.* at 536-37, 540-41, 544. In capital punishment cases, the judge is allowed to impose the death sentence based on a judicial finding of aggravating statutory factors after the jury finds the defendant guilty of an offense (*e.g.* first degree murder) that carries with it a maximum penalty of death. *Id.* at 537. “If the judge does not find the existence of a statutory aggravating circumstance, the maximum punishment authorized by the jury’s guilty verdict is life imprisonment.” *Id.* *Apprendi* may be implicated because the judge’s finding increases the defendant’s sentence beyond life imprisonment, which is the maximum punishment authorized by the jury. *Id.*; see also Chemerinsky, *supra* note 14, at 522 (stating *Apprendi* may “establish[] the broader principle that it is wrong to punish a person for crimes that were not proven beyond a reasonable doubt”).

281. Andrew J. Fuchs, Note, *The Effect of Apprendi v. New Jersey on the Federal Sentencing Guidelines: Blurring the Distinction Between Sentencing Factors and Elements of a Crime*, 69 FORDHAM L. REV. 1399, 1429 (2001). In the vast majority of states juries determine the life or death sentence, unless the defendant requests sentencing by the court. Marcia A. Widder, *Hanging Life in the Balance: The Supreme Court and the Metaphor of Weighing in the Penalty Phase of the Capital Trial*, 68 TUL. L. REV. 1341, 1342 n.6 (1994). However, Nebraska, Montana, Idaho, and Arizona use a trial judge to determine the sentence after the jury verdict. *Id.*

282. Fuchs, *supra* note 281, at 1429. Alabama, Delaware, Florida, and Indiana use a trifurcated system that requires the involvement of the jury and judge in the death penalty sentencing scheme. Abe Muallem, Note, *Harris v. Alabama: Is the Death Penalty in America Entering a Fourth Phase?*, 22 J. LEGIS. 85, 87 (1996). After a determination of guilt, a separate penalty hearing is held before a jury, which renders an advisory opinion for a life or death sentence. Widder, *supra* note 281, at 1342 n.6. “The trial judge then determines the sentence and may override the jury’s recommendation of a life sentence.” *Id.* In Florida, Indiana, and Delaware, before a judge may disregard the jury’s opinion, he or she must find “the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.” Muallem, *supra* (noting the clear and convincing requirement in capital punishment sentencing schemes is referred to as the “*Tedder* standard”) (quoting *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975)). Alabama’s death sentencing scheme does not specify any particular standard of proof when overriding a jury’s recommendation. *Id.* at 99. The Court has rejected “the idea that any specific weight should be given to particular factors, either in aggravation or mitigation, when considering a death sentence . . .” *Id.* at 101. However, after *Apprendi*, any aggravating factor that extends the defendant’s penalty beyond a statutory maximum of life imprisonment must be proved beyond a reasonable doubt to a jury. M. Kate Calvert, *Obtaining Unanimity and a Standard of Proof on the Vileness Sub-Elements with Apprendi*, 13 CAP. DEF. J. 1 (2000); see also *Apprendi*, 530 U.S. at 490 (stating “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt”).

283. *Apprendi*, 530 U.S. at 536-37. Justice O’Connor cited the example of *Walton v. Arizona*, 497 U.S. 639, 643 (1990) where a jury found the defendant guilty of first-degree murder. *Id.* at 536 (discussing Arizona state capital punishment procedures). After the jury finds the defendant guilty of first-degree murder, the judge conducts a separate sentence hearing to determine whether the defendant deserves death or life imprisonment. *Id.* The Court held in *Walton*, that this capital

If a State can remove from the jury a factual determination that makes the difference between life and death, . . . it is inconceivable why a State cannot do the same with respect to a factual determination that results in only a 10-year increase in the maximum sentence to which a defendant is exposed.²⁸⁴

This analogy highlights the theory that if a judge may extend a defendant's punishment from life imprisonment to the death penalty, then judges should also be able to enhance a defendant's prison sentence.²⁸⁵ It is unclear why judges can extend a defendant's sentence in a capital punishment case, but not in other criminal cases, and this is likely to create great uncertainty for judges attempting to apply the *Apprendi* holding.²⁸⁶ Thus, it appears that the majority has invalidated the current capital punishment sentencing structure; because, read expansively, the *Apprendi* rule prohibits judges from making findings that expose defendants to any greater punishment than that found by a jury.²⁸⁷

Ironically, Justice O'Connor acknowledged that the majority's rule does seem to make an exception for capital punishment cases, which means

punishment procedure was constitutional. *Id.* at 536-37 (citing *Walton*, 497 U.S. at 647). *Walton* means that there is no constitutional requirement that a jury impose the death sentence or make the factual findings that determine whether the death penalty is appropriate. *Id.* at 537.

The majority used *Walton* "to dispose of a possible argument that the *Apprendi* rule would render invalid state capital sentencing schemes that allow a judge, after a jury verdict on a capital crime, to impose a death sentence by finding aggravating factors." Calvert, *supra* note 282, at 17. "However, what the *Apprendi* Court failed to note is that most states, . . . leave the capital sentencing decision in the hands of the jury." *Id.* at 18. Arguably, the rationale behind *Walton*, that judges are "presumed to know the law and to apply it in making their decisions" . . . is not applicable in jury sentencing states." *Id.* (quoting *Walton*, 497 U.S. at 653). Thus, the question remains open whether *Apprendi* could be used to challenge death sentences based upon a jury's finding of aggravating factors. *Id.*

284. *Apprendi*, 530 U.S. at 537.

285. *See id.*

286. *Id.* at 538 (finding "[t]he distinction of . . . [capital punishment cases] offered by the Court today is baffling, to say the least"). However, sentencing by judges in capital punishment schemes does comport with a strict reading of *Apprendi*, if the assumption is made that judges are merely determining a defendant's sentence within the permissible statutory range of life imprisonment to the death penalty. *See id.* at 496-97. This means that a capital punishment scheme where a judge weighs aggravating and mitigating factors will be upheld so long as a judge does not "determine the existence of a factor which makes a crime a capital offense." *Id.* at 497 (quoting *Almendarez-Torres*, 523 U.S. 224, 257 n.2 (1998) (Scalia, J. dissenting) (emphasis deleted)). "[O]nce a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed . . ." *Id.* (quoting *Almendarez-Torres*, 523 U.S. at 257 n.2 (Scalia, J. dissenting) (emphasis deleted)).

287. *See id.* at 497 (majority opinion), 538 (O'Connor, J., dissenting) (criticizing that if the majority "does not intend to overrule [the current capital punishment system], one would be hard pressed to tell from the opinion it issues today" (citation omitted)).

Apprendi is limited in scope.²⁸⁸ However, if the majority has made an exception for capital punishment cases and limited the scope of its holding, then the maximum penalty rule becomes “meaningless and formalistic.”²⁸⁹ The majority upholds the capital punishment sentencing scheme on the basis that a jury has found all the elements of the crime and a judge is merely applying a sentence within a statutory range where the maximum penalty is death. Nonetheless, the rule is formalistic because the “effect on the defendant would be no different from a scenario in which the statutory penalty is life and the judge then increases the defendant’s sentence past that maximum and imposes a sentence of death after making certain findings.”²⁹⁰

The formalistic nature of the rule is also apparent in non-capital punishment scenarios because a state could remove sentencing from a jury and use a preponderance of the evidence standard to find facts that decrease the punishment below the prescribed statutory maximum.²⁹¹ For example, a defendant could be sentenced between five to twenty years for weapons possession.²⁹² However, a judge could find by a preponderance of the evidence that a defendant did *not* act with a hate motive and sentence him to no greater than ten years imprisonment.²⁹³ On closer analysis of this example, we see the reality is that contained within the weapons possession sentence of five to twenty years is an assumption that the person acted with a hate motive.²⁹⁴ To be found not guilty of the hate motive, the judge must find by a preponderance of the evidence that the defendant did not act with hatred.²⁹⁵ Thus, as this example illustrates, the majority’s statutory maximum rule is one of form rather than substance, because a state could merely redefine the language of its statute and allow a judge to determine the absence of hate motive by a preponderance of the evidence.²⁹⁶

288. *Id.* at 540-41.

289. *Id.* at 541.

290. Fuchs, *supra* note 281, at 1430; *see also Apprendi*, 530 U.S. at 541. The rule is formalistic because,

essentially, the jury has simply found the defendant guilty of the crime and has left the option of imposing the death penalty to the judge. Mere wording of the statute would dictate the availability of the protections that the defendant is entitled to receive, and in capital punishment jurisprudence, formalism should arguably be most carefully scrutinized.

Fuchs, *supra* note 281, at 1430.

291. *Apprendi*, 530 U.S. at 541-43.

292. *See id.*

293. *See id.*

294. *See id.*

295. *See id.*

296. *Id.* at 541-44. Justice O’Connor concluded:

If New Jersey can, consistent with the Constitution, make precisely the same differences in punishment turn on precisely the same facts, and can remove the assessment of those facts from the jury and subject them to a standard of proof below “beyond a reasonable doubt,” it is impossible to say that the Fifth, Sixth, and Fourteenth Amendments require the Court’s rule.

*b. Federal and State Criminal Sentencing Schemes**i. The Biggest Impact of Apprendi Will be to Declare
Sentencing Schemes Unconstitutional and Overturn Vast
Numbers of Convictions*

The Court has never ruled on the proper standard to be used under the federal Sentencing Guidelines²⁹⁷ and it is highly questionable after *Apprendi* whether the frequently used preponderance standard is constitutional.²⁹⁸ In response to this uncertainty, Justice O'Connor focused on the strong impact of *Apprendi* that will be felt throughout federal and state courtrooms.²⁹⁹ She predicts that "in light of the adoption of . . . sentencing [factors] . . . by many States and the Federal Government, the consequences of the Court's and Justice Thomas' rules in terms of sentencing schemes invalidated by . . . [*Apprendi*] will likely be severe."³⁰⁰ The decision will have broad effects on sentencing procedures because it has been common practice in our judicial system for judges to frequently make "sentencing decisions on the basis of facts that they determined for themselves, on less than proof beyond a reasonable doubt" in all kinds of different criminal cases.³⁰¹ Therefore, the holding in *Apprendi* that "a defendant is entitled to have a jury decide, by proof beyond a reasonable doubt, every fact relevant to the determination of [his] sentence . . . will have the effect of invalidating significant sentencing reform accomplished at the federal and state levels over the past three decades."³⁰²

Id. at 543 (responding to Justice Thomas' opinion that the Constitution mandates the majority's statutory maximum rule).

297. Richard Husseini, Comment, *The Federal Sentencing Guidelines: Adopting Clear and Convincing Evidence as the Burden of Proof*, 57 U. CHI. L. REV. 1387, 1391-93 (1990) (recognizing that the Guidelines do not state that any specific standard of proof must be used); see also *Apprendi*, 530 U.S. at 497 n.21 (noting the Guidelines are not before the Court).

298. See *infra* notes 303-316 and accompanying text; see also Husseini, *supra* note 297, at 1394-1411 (arguing that the constitutionality of the preponderance standard is unclear under *McMillan* and *Winship* and thus advocating the use of the clear and convincing evidence standard).

299. *Apprendi*, 530 U.S. at 543-53.

300. *Id.* at 544. An assistant prosecutor in Texas expects that "*Apprendi* is going to be one of the most-significant rulings in the 21st century" because it could change the way state and federal prosecutors present certain cases to a grand jury. Cammarere, *supra* note 3, at 41. Joseph D. O'Neill, *Apprendi*'s lawyer, believes this case will "probably [be] the most-important decision in the criminal area in the past four or five years." *Id.*

301. *Apprendi*, 530 U.S. at 545 (quoting Lynch, *supra* note 268, at 320 (footnote omitted)).

302. *Apprendi*, 530 U.S. at 549. The majority's holding will affect both discretionary-sentencing schemes (where a judge finds any number of facts that are never presented at trial and found by a jury beyond a reasonable doubt) and determinative-sentencing schemes (where a judge finds specific facts that are stated in guidelines). *Id.* at 543-47; see also J. Stephen Welch, *Apprendi v. New Jersey*

Although the majority declined to hold whether the federal Sentencing Guidelines remain constitutional,³⁰³ the likely result of the Court's rule if applied broadly is that the Guidelines are invalid.³⁰⁴ As a result, the biggest impact of Justice Stevens' decision will be seen in the vast number of defendants that will appeal convictions based on sentencing factors.³⁰⁵ Justice O'Connor predicts that *Apprendi* "threatens to unleash a flood of petitions by convicted defendants" seeking to overturn convictions that were based on determinative-sentencing schemes, such as the federal Sentencing Guidelines.³⁰⁶ Based on statistics gathered by the United States Sentencing Commission, nearly a half-million defendants have been sentenced under the Guidelines.³⁰⁷ Furthermore, many state sentencing practices would be upset because forty-seven states allow the judge to set the sentence for defendants in non-capital felony cases, thirteen states permit the judge to set the conviction in capital felony cases (includes instances where the jury gives sentencing recommendation to the judge), twelve states allow judges to alter sentences (first determined by juries or judges) in capital felony cases, and five states allow the judiciary to change sentences (after set by judge or jury) in non-capital felony cases.³⁰⁸

Moreover, federal cases are "only the tip of the iceberg."³⁰⁹ In 1998, federal criminal cases constituted only 0.4% of the total number of criminal prosecutions in state and federal courts.³¹⁰ Since the Court has failed to clarify the exact reach of its holding, "federal and state judges are left in a state of limbo."³¹¹ Courts at state, federal, and local levels, as well as

Watershed Ruling for the New Millennium?, 12 S.C. LAW. 36, 39 (2001) (explaining how *Apprendi* applies to sentencing enhancements for drugs, terrorism, and weapons in criminal activities); Justin A. Thornton & Mark H. Allenbaugh, *Apprenditis: A Troubling Diagnosis for the Sentencing of Hackers, Thieves, Fraudsters, and Tax Cheats*, 9 GEO. MASON L. REV. 419, 444 (2000) (arguing that the *Apprendi* ruling extends to economic crimes).

303. See *supra* notes 194-195 and accompanying text.

304. *Apprendi*, 530 U.S. at 549-51. "[T]he Court does not say whether these schemes are constitutional, but its reasoning strongly suggests that they are not." *Id.* (O'Connor, J., dissenting).

305. *Id.* at 551-52.

306. *Id.* at 551; see also *supra* note 302.

307. *Id.*

308. U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATION 1998, *Table 46 Sentencing Procedures in Capital and Non-Capital Felony Cases* (June 2000), at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sco98.pdf> (last visited Mar. 30, 2002); *supra*, at *Table 44 Sentencing Statutes: Key Definitions and Provisions For Sentence Enhancement* (listing a state by state breakdown of criminal statutes, statutory maximums, and possible sentencing enhancements).

309. *Apprendi*, 530 U.S. at 551.

310. *Id.* (showing that in 1998 14,623,330 state criminal cases were *filed*, compared to only 57,691 federal criminal cases); see also SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2000, JUDICIAL PROCESSING OF DEFENDANTS, TABLE 5.25, at <http://www.albany.edu/sourcebook/> (last visited Mar. 30, 2002) (providing a detailed statistical breakdown of the number of individuals sentenced for particular offenses in fiscal year 1999, and showing 55,388 people were *actually* sentenced under the federal Sentencing Guidelines).

311. *Apprendi*, 530 U.S. at 551 (lamenting the majority has created confusion in the world of criminal sentencing because the Court has not defined "the precise contours of the constitutional principle underlying its decision . . .").

legislatures, are left wondering whether they should continue to convict defendants under sentencing schemes that allow judges to find sentencing factors by a preponderance of the evidence.³¹² Justice O'Connor summarized, many changes in American sentencing schemes seem imminent because the majority's "reasoning suggests that *each new sentence* will rest on shaky ground."³¹³ Perhaps "[t]he most unfortunate aspect of [the Apprendi] decision is that [the Court's] precedents did not foreordain this disruption in the world of sentencing."³¹⁴ Rather, the Court "traditionally took a cautious approach to questions like the one presented in this case."³¹⁵ However, Apprendi's majority "throws that caution to the wind and, in the process, threatens to cast sentencing in the United States into what will likely prove to be a lengthy period of considerable confusion."³¹⁶

ii. Justice Breyer Argues that Policy Supports the Sentencing Guidelines

Justice Breyer, an author of the Sentencing Guidelines,³¹⁷ is also troubled that Apprendi calls into question the continuing validity of the federal sentencing scheme.³¹⁸ In modern criminal procedure, broad judicial discretion is essential because it is too difficult, confusing, or inefficient for a jury to decide the presence of factors that are highly prejudicial to the defendant when the big question is guilt or innocence.³¹⁹ Therefore, it is necessary for a judge to determine the degrees of bias that a defendant may have exhibited towards his or her victim.³²⁰

While at first glance it appears that the goal of the majority's rule³²¹ is to protect criminal defendants' rights,³²² in actuality the rule is unworkable

312. See *id.*

313. *Id.* at 552 (emphasis added).

314. *Id.*

315. *Id.*

316. *Id.*

317. Richard Singer, *The Model Penal Code and Three Two (Possibly Only One) Ways Courts Avoid Mens Rea*, 4 BUFF. CRIM. L. REV. 139, 161 n.54 (2000) (noting the dissenting opinions in *Jones* and *Apprendi* clearly express Breyer's sentiment that the Sentencing Guidelines may be in jeopardy); see also Linda Greenhouse, *Justices Consider Hate-Crime Sentencing*, N.Y. TIMES, Mar. 29, 2000, at A22. Justice Breyer worked on the Sentencing Guidelines when he had a job with the Senate in the 1970s. *Id.*

318. See *id.* Justice Breyer responded to Apprendi's lawyer, that "[i]f I agree with you, I guess I'm holding the Sentencing Commission unconstitutional' because judges, not juries, apply the various factors that determine a defendant's sentence." *Id.*

319. See Apprendi, 530 U.S. at 556-58 (Breyer, J., dissenting).

320. See *id.*

321. Justice Breyer concluded the majority's rule is that the Constitution requires: "[A]ny fact [other than recidivism] that increases the penalty for a crime beyond the prescribed statutory

because it envisions a “procedural ideal” where juries rather than judges predominantly determine the existence of facts that increase a defendant’s punishment.³²³ However, “the real world of criminal justice” cannot be expected to meet such an ideal,³²⁴ because the system can only function efficiently and effectively when judges have broad discretion to find these facts.³²⁵ Therefore, it appears that requiring juries to find sentencing factors beyond a reasonable doubt is impractical and that such a sentencing procedure stands at odds with what the Constitution requires of our justice system.³²⁶

The Sentencing Guidelines are justified because policy and practical concerns weigh in favor of protecting criminal defendants from juries that could be confused or inflamed when determining the existence of sentencing factors.³²⁷ In modern times, judges have been given wide latitude in finding facts and sentencing defendants because there are “far too many potentially relevant sentencing factors to permit submission of all (or even many) of them to a jury.”³²⁸ Asking a jury to consider such factors where the real question is guilt or innocence, “could easily place the defendant in the awkward (and conceivably unfair) position of having to deny he committed the crime yet offer proof about how he committed it, *e.g.*, ‘I did not sell drugs, but I sold no more than 500 grams.’”³²⁹ Hence, in today’s criminal justice system, judges use sentencing factors to individualize the defendant’s punishment so that it is tailored to that defendant’s particular crime.³³⁰ Thus,

maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Id.* at 555 (alteration in original).

322. *See id.* at 564 (stating he is willing “to assume that the majority’s rule would provide a degree of increased procedural protection . . . [however, it] provides little practical help and comes at too high a price”).

323. *Id.* at 555.

324. *Id.*

325. *See id.* The criminal justice system functions because of “procedural compromises” between the judge and jury in the area of defendant sentencing. *Id.* The majority’s holding has a tendency to upset the compromise by implementing a sentencing procedure never mandated by the Constitution. *See id.* Furthermore, “the rationale that underlies the Court’s rule suggests a principle - jury determination of all sentencing-related facts - that, unless restricted, threatens the workability of every criminal justice system (if applied to judges) or threatens efforts to make those systems more uniform, hence more fair . . .” *Id.* at 565.

326. *See id.* at 555.

327. *Id.* at 555-57.

328. *Id.* at 557. For example, the Sentencing Guidelines state that a judge should consider whether,

[a] bank robber with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, a teller or a customer, at night (or at noon), for a bad (or arguably less bad) motive, in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time that day, while sober (or under the influence of drugs or alcohol), and so forth.

Id. (quotation omitted).

329. *Id.* at 557.

330. *Id.* at 557-58 (citing *Williams v. New York*, 337 U.S. 241, 249-51 (1949)).

the Sentencing Guidelines serve the important functions of giving judges a set of criteria to consider which promotes uniformity in defendants' punishment, while at the same time allows judges to be "guided by experience, relevance, and a sense of proportional fairness."³³¹

2. *Apprendi* Should be Narrowly Construed with Respect to the Sentencing Guidelines, Capital Punishment and the Recidivism Exception, However *Apprendi* has Forced Courts to Rethink Defendant Sentencing in Drug Cases

a. *Apprendi* Clearly Applies to Drug Cases and Now Juries Must Determine Factors Used to Enhance Penalties Beyond the Statute's Maximum

Many commentators have predicted *Apprendi* would result in a massive overhaul of sentencing schemes, especially in the realm of drug convictions.³³² However, in actuality, courts have minimized the impact of

331. *Id.* Before the Sentencing Guidelines, judges would impose very different sentences upon defendants involved in essentially the same type of criminal conduct. *See id.* Under the Sentencing Guidelines system, judges "retain[] freedom to depart in atypical cases." *Id.* at 560. Overturning the Guidelines would eliminate the benefits of the Guidelines including sentence uniformity, avoiding the interjection of jury sympathies, which would create disparate sentences, and allowing judges who have experience sentencing defendants that are similarly situated to determine the penalty. *See* Fuchs, *supra* note 281, at 1437-38.

Under the Guidelines, a particular crime *e.g.* narcotics possession with intent to distribute, carries with it a specific statutory maximum. *Id.* at 1418. To determine the sentencing range for this crime, the Guidelines provide the judge with a method of generating an appropriate range. *Id.* at 1417-18. The judge determines the range by looking at the individual defendant's criminal record *e.g.*, prior convictions, and the seriousness of the instant crime he or she is charged with *e.g.*, the crime is more serious if there is a high quantity of drugs. *Id.* The penalty imposed by the judge must be within this narrow sentencing range, which is bound by the statutory maximum for the particular crime. *Id.* Because the judge is limited to imposing a sentence that is capped by a statutory maximum, *Apprendi* should not be used to invalidate the Sentencing Guidelines. *See id.* at 1418. Under a limited application of *Apprendi*, its rule would be applied to specific instances where the sentence is extended beyond the statutory maximum. Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1479 (2001). Thus, "the narrow *Apprendi* rule does not threaten presumptive sentencing schemes such as the Guidelines, so long as the sentences dictated by statute, court rule, or guideline are within the maximum sentence authorized by statute for the offense." *Id.*

332. *See* Greenhouse, *supra* note 2, at A19 (concluding *Apprendi* "opens the door" to challenges in the area of federal drug sentences); *see also* Mumma, *supra*, note 150, at A1 (predicting the ruling will have a wide impact on cases involving "penalty enhancements"); Cammarere, *supra* note 3, at 41 (surveying appellate court responses to *Apprendi* and determining "the clear impact has been on drug cases, with a number of federal appellate courts ruling the quantity of drugs - a fact that can dramatically increase a sentence - is an issue for a jury to decide"); Claire Cooper & Denny Walsh, *Courts Must Reconsider Some Sentences For Offenders*, SACRAMENTO BEE, available at

Apprendi by narrowly construing its holding.³³³ Circuit courts have tended to limit the application of *Apprendi* to situations where a factor is used to increase a sentence beyond the statutory maximum³³⁴ and have narrowly applied *Apprendi* to the Guidelines.³³⁵ Nevertheless, drug cases remain particularly vulnerable to the *Apprendi* holding because the jury finds whether the defendant is guilty, while the judge “makes many crucial

<http://www.november.org/apprendi9thcircuit.html> (last visited Jan. 27, 2001) (stating Erwin Chemerinsky found that by the end of August 2000, thirty-six state and federal courts had grappled with the *Apprendi* case); Lawrence Messina, *U.S. Supreme Court Influencing Sentencing Here Ruling Could Radically Change How Judges Calculate Prison Terms in Federal Court*, CHARLESTON GAZETTE & DAILY MAIL, July 25, 2000, at A2, available at 2000 WL 2619088 (finding prosecutors expect *Apprendi* to have its biggest impact on drug cases).

333. See *Jones v. United States*, 530 U.S. 1271 (2000), remanded to *United States v. Jones*, 235 F.3d 1231, 1233 (10th Cir. 2000) [hereinafter “*Carless Jones*”]. After *Apprendi*, the Tenth Circuit concluded, the rule in *Jones v. United States* 526 U.S. 227 (1999) (from the 9th Circuit and discussed *supra* at notes 126-145 and accompanying text) has “been explicitly adopted by the Supreme Court in *Apprendi v. New Jersey*.” *Carless Jones*, 235 F.3d at 1233. The Tenth Circuit recognized courts were in agreement that *Apprendi* should be narrowly construed so as not to overrule the Sentencing Guidelines, and only be applied in the limited instances where a sentencing factor is used to increase a conviction beyond the statutory maximum. See *id.* at 1233 n.1.

334. See *id.* The court noted the following decisions where *Apprendi*’s holding had been limited: *United States v. Angle*, 230 F.3d 113, 123 (4th Cir. 2000) (applying *Apprendi* to prosecution under 21 U.S.C. § 841 and holding that drug quantity must be presented to a jury and proven beyond a reasonable doubt to impose a sentence greater than the twenty-year maximum authorized by 21 U.S.C. § 841 (b)(1)(C)); *United States v. Doggett*, 230 F.3d 160, 164-65 (5th Cir. 2000) (same); *United States v. Page*, 232 F.3d 536, 542-43 (6th Cir. 2000) (same); *United States v. Aguayo-Delgado*, 220 F.3d 926, 933-34 (8th Cir. 2000) (same); *United States v. Nordby*, 225 F.3d 1053, 1059 (9th Cir. 2000) (same); *United States v. Rogers*, 228 F.3d 1318, 1327 (11th Cir. 2000) (same).

Id.

After *Carless Jones*, the remaining circuits also limited *Apprendi*. See *United States v. Baltas*, 236 F.3d 27, 41 (1st Cir. 2001) (holding *Apprendi* only applies when the sentence extends beyond the statutory maximum, but not when the sentence is within the prescribed range). Although “the question of whether, after *Apprendi*, a judge’s fact findings that create a higher mandatory minimum violate a defendant’s right to a jury trial is an open one in this circuit, that question is not before us” and thus, the holding is limited to cases where the sentence is extended beyond the maximum. *United States v. Champion*, 234 F.3d 106, 109-10 (2nd Cir. 2000); see also *United States v. Cepero*, 224 F.3d 256, 267-68 & n.5 (3rd Cir. 2000) (leaving open the question of whether the Sentencing Guidelines could ever be unconstitutional, but limiting *Apprendi* to statutory maximums); *United States v. Akinwale*, 248 F.3d 1160 (unpublished table opinion), available at 2000 U.S. App. LEXIS 30192, at *8 (7th Cir. 2000) (holding “*Apprendi* has no application in calculating guideline ranges” and “[m]oreover, *Apprendi* is irrelevant to [defendant’s] case because the term of imprisonment imposed by the district court is less than 20 years - the lowest statutory maximum for heroin offenses” (citation omitted)); *United States v. Williams*, 2000 U.S. App. LEXIS 26679, at *1-2 (D.C. Cir. 2000) (per curiam) (unpublished opinion) (finding *Apprendi* irrelevant because sentence is within the statutory range).

335. See Cammarere, *supra* note 3, at 41 (no federal court has overruled the Guidelines but *Apprendi* still casts doubt over their validity); see also Fuchs *supra* note 281, at 1427-38 (arguing *Apprendi* should be narrowly construed to apply in situations where the sentence is increased beyond the statutory maximum so that the Sentencing Guidelines are not invalidated); cf. Masters, *supra* note 2, at A1 (quoting Fourth Circuit Court judge, William W. Wilkins Jr., chairman of the Sentencing Commission, “[m]y reading of *Apprendi* leads me to conclude this decision will not have a dramatic effect,” because “[i]t does not apply to many factors found in the guidelines, such as role in the offense”).

determinations about the type and quantity of the drugs, the harm caused by the offense and the characteristics of the offender.”³³⁶ After *Apprendi*, many courts and lawyers may find that prosecuting drug offenders has become more difficult because defendants frequently contest the amount of drugs they are alleged to have sold, which means it would be hard to get a jury of twelve people to each agree on the exact quantity sold.³³⁷ Thus, before *Apprendi*, judges decided how much was sold; now juries must sometimes make this determination.³³⁸

In *United States v. Angle*, Judge James H. Michael from the Fourth Circuit explained the impact of *Apprendi* on drug cases.³³⁹ He summarized,

336. Greenhouse, *supra* note 2, at A19; see also SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2000, JUDICIAL PROCESSING OF DEFENDANTS, TABLE 5.25, TABLE 5.34, available at <http://www.albany.edu/sourcebook/> (last visited Mar. 30, 2002) (showing that between 1990 to 1999 a total of 169,851 people were sentenced in United States District Courts for drug offenses and in fiscal year 1999 alone, 20,079 people were convicted under the Guidelines for drug crimes); Kyle O'Dowd, *Grid & Bear It: Weighing the Evidence: Drug Quantity Issues in Mandatory Minimum Cases*, 24 CHAMPION 43, 43-44 (2000) (noting the Supreme Court granted certiorari in *Apprendi v. New Jersey* to clarify whether sentencing factors, such as those in drug cases could be used to extend the statutory maximum, and that prior to *Apprendi* the law of the twelve circuits was that drug quantity was a sentencing factor and not an element of the of crime drug trafficking).

Interestingly, the Supreme Court started its new term by beginning where it left off in *Apprendi* by “directing a potential revolution in federal sentencing” in the area of drug sentencing. Linda Greenhouse, *Supreme Court Roundup; Justices' Decisions Shape New Course for U.S. Sentencing*, N.Y. TIMES, Oct. 3, 2000, at A18. The revolution Greenhouse refers to is the Court's seemingly unwavering adherence to its policy that drug convictions must be within the statutory maximum. See *id.* (concluding it is now clear a jury must determine facts that can lead to a sentence longer than the maximum, however, the Supreme Court chose not to touch the broader Guidelines question).

The Court bolstered *Apprendi* by remanding several circuit court cases back to be reconsidered in light of that decision. See *Burton v. United States*, 531 U.S. 801 (2000) (mem.), remanded to *Burton v. United States*, 237 F.3d 490, 490-91 (5th Cir. 2000) (per curiam) (holding intent to distribute drugs must be alleged in indictment, found by a jury beyond a reasonable doubt when it enhances sentence above statutory maximum); *Blue v. United States*, 531 U.S. 801 (2000) (mem.) (vacating and remanding back to Fourth Circuit); *Gibson v. United States*, 531 U.S. 801 (2000) (mem.) (vacating and remanding back to Fourth Circuit); *Cammarere*, *supra* note 3, at 41 (reporting that after *Gibson*, the U.S. Attorney's Office changed how it indicts criminals and now drug quantity must be specified in the indictment); *Wims v. United States*, 531 U.S. 801(2000) (mem.) (vacating and remanding back to Eleventh Circuit).

337. See *Cammarere*, *supra* note 3, at 41. One expert on criminal sentencing framed the issue after *Apprendi* as:

“The question is how formalist the court will be, . . . [t]remendously important factual questions are decided at sentencing.” For example, . . . the guidelines instruct judges to impose a sentence based not on the precise quantity of drugs for which a defendant was convicted, but on the “relevant quantity,” which requires deciding whether a defendant caught with a small quantity of drugs knew about an entire shipment of which the small amount formed a part.

Greenhouse, *supra* note 336, at A18.

338. See *id.*

339. *United States v. Angle*, 230 F.3d 113 (4th Cir. 2000), *aff'd in part en banc*, 254 F.3d 514,

“[h]istorically, this court and all of her sister circuits have held that drug quantity is a sentencing factor, not an element of the crime.”³⁴⁰ Although the Court held in *Jones* that any fact, other than prior conviction, that raises the penalty beyond the statutory maximum is an element of the crime and must be charged in the indictment,³⁴¹ circuit courts “interpreted this opinion as a suggestion rather than an absolute rule.”³⁴² Thus, before *Apprendi*, drug quantity was still viewed as a sentencing factor because *Jones* “‘never ultimately resolved the constitutional doubts it raised.’”³⁴³

Now after *Apprendi*, all the circuit courts must hold that the “quantity of drugs” factor is an element of the crime and cannot be a sentencing factor when drug quantity is used to extend a sentence beyond the statutory maximum.³⁴⁴ Courts, like the Fifth Circuit, have responded to *Apprendi* by overruling pre-*Jones* jurisprudence in which drug quantity was a sentencing factor found by a judge, rather than an element of the crime.³⁴⁵ The Fifth

517 (4th Cir. 2001) (concluding no plain error under *Apprendi* and upholding defendants’ convictions, but remanding for factual finding on quantity of drugs).

340. *Angle*, 230 F.3d 113, 122 (4th Cir. 2000) (citing *United States v. Powell*, 886 F.2d 81, 85 (4th Cir. 1989); *United States v. Thomas*, 204 F.3d 381, 384 (2d Cir. 2000); *United States v. Hester*, 199 F.3d 1287, 1291 (11th Cir. 2000); *United States v. Williams*, 194 F.3d 100, 107 (D.C. Cir. 1999); *United States v. Mabry*, 3 F.3d 244, 250 (8th Cir. 1993); *United States v. Underwood*, 982 F.2d 426, 429 (10th Cir. 1992); *United States v. Moreno*, 899 F.2d 465, 472-73 (6th Cir. 1990); *United States v. Barnes*, 890 F.2d 545, 551 n.6 (1st Cir. 1989); *United States v. Gibbs*, 813 F.2d 596, 599-600 (3d Cir. 1987); *United States v. Morgan*, 835 F.2d 79, 81 (5th Cir. 1987); *United States v. Normandeau*, 800 F.2d 953, 956 (9th Cir. 1986)).

341. *Id.* (citing *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999)).

342. *Id.*

343. *Id.* (quotation omitted).

344. *United States v. Corrado*, 227 F.3d 528, 542 (6th Cir. 2000) (holding *Apprendi* only applies if there is an increase in the statutory maximum); *United States v. Williams*, 235 F.3d 858 (3rd Cir. 2000), *cert. denied*, 122 S. Ct. 49 (2001) (mem.) (concluding that judge increased defendant’s sentence by making factual finding that defendant possessed a certain amount of drugs, but did not go beyond the statutory maximum and hence, *Apprendi* does not apply); *United States v. Aguayo-Delgado*, 220 F.3d 926 (8th Cir. 2000) (abandoning Eighth Circuit authority upholding drug quantity as sentencing factor to the extent it is inconsistent with *Apprendi*), *cert. denied*, 531 U.S. 1026 (2000) (mem.); Singer, *supra* note 317, at 209-16 (providing a comprehensive analysis of whether “drug amount” is an element of the crime and method used to determine the amount). “[T]he federal courts have held that the amount or type of drugs involved in an offense, although sometimes significantly increasing the punishment, was not an ‘element’ of the crime but a ‘sentencing factor.’ Most state courts, however, disagree, holding that the amount is an element provable at trial.” Singer, *supra* note 318, at 186. Forty-five states consider drug amount an element of the crime that must be proved to a jury beyond a reasonable doubt, while three states use a judge to determine amount. *Id.* at 210. The remaining states “do not appear to use amount of drugs to differentiate among drug crimes at all.” *Id.* at 209.

345. *United States v. Keith*, 230 F.3d 784, 785-87 (5th Cir. 2000) (per curiam), *cert. denied*, 531 U.S. 1182 (2001) (mem.); *see also United States v. Doggett*, 230 F.3d 160, 165 (5th Cir. 2000) (holding drug quantity under *Apprendi* must be found by jury beyond a reasonable doubt if it extends conviction over statutory maximum), *cert. denied*, 531 U.S. 1177 (2001) (mem.); *United States v. Meshack*, 225 F.3d 556, 575-77 (5th Cir. 2000) (concluding *Apprendi* should not be read overbroadly), *cert. denied Parker v. United States*, 531 U.S. 1100 (2001) (mem.); *see also Edwards v. United States*, 523 U.S. 511, 513-14 (1998) (upholding the Sentencing Guidelines and stating “[t]he Sentencing Guidelines instruct the judge in a case like this one to determine both the amount and the kind of ‘controlled substances’ for which a defendant should be held accountable - and then

Circuit held that *Apprendi* should be strictly read and limited to instances when the factor “drug quantity” is used to increase a sentence beyond the statutory maximum.³⁴⁶ This holding comports with *Apprendi*, because it would be an “overbroad” interpretation of *Apprendi* to hold the Sentencing Guidelines unconstitutional.³⁴⁷

Fifth Circuit Judge Emilio M. Garza explicitly declined to interpret *Apprendi* expansively.³⁴⁸ He stated:

Apprendi does not clearly resolve whether an enhancement which increases a sentence within the statutory range but which does not increase the sentence beyond that range must be proved to the jury. However, the opinion suggests the more limited rule: “fact[s] that increase[] the penalty for a crime *beyond* the prescribed *statutory* maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi*, 120 S. Ct. at 2362-63 (emphasis added). Additionally, the *Apprendi* majority expressly declined to reverse an earlier opinion allowing a judge to determine by a preponderance whether an enhancement should apply, instead limiting that case’s “holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury’s verdict.” *Id.* at 2361 n.13 (discussing *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S. Ct. 2411, 91 L.Ed.2d 67 (1986), and noting that it might reconsider the holding in the future). Given that the more limited reading of *Apprendi* is a more plausible reading of the case, and given the profound effect a broader rule would have on existing Supreme Court and Fifth Circuit precedent, we believe the limited reading of *Apprendi* is the more desirable one. *Cf. United States v. Aguayo-Delgado*, 220 F.3d 926, 933[-34] (8th Cir. 2000) (“If the non-jury factual determination only narrows the sentencing judge’s discretion within the range already authorized by the offense of conviction, . . . then the governing constitutional standard is provided by *McMillan*.”).³⁴⁹

to impose a sentence that varies depending upon amount and kind”).

346. See *Keith*, 230 F.3d. at 786-87 (concluding drug quantity is an element and must be alleged in the indictment and found by the jury beyond a reasonable doubt if the factor increases the conviction beyond the statutory maximum).

347. *Id.* at 787.

348. See *Meshack*, 225 F.3d at 576.

349. *Id.*; see also *United States v. Behrman*, 235 F.3d 1049, 1053 (7th Cir. 2000). In *Behrman*, the defendant argued that paying \$243,000 in restitution for tax fraud although within the statutory

Therefore, the court determined that *Apprendi* should only apply when a sentence exceeds the statutory maximum, and not to instances where a sentence is enhanced within the statutory range based on a finding of drug quantity.³⁵⁰

b. *Courts Should Not Apply Apprendi Retroactively in Habeas Corpus Appeals or Consider Apprendi a Mandate to Overrule Almendarez-Torres' Recidivism Exception*

i. *Habeas Corpus Appeals*

Erwin Chemerinsky concluded that after *Apprendi*, there is the big question of whether its holding applies retroactively.³⁵¹ Under *Mackey v. United States*, 401 U.S. 667 (1971), the Supreme Court stated that criminal procedure cases are retroactive “if they place certain kinds of primary, private individual conduct beyond the power of the criminal law or if they are implicit in the concept of ordered liberty³⁵² and watershed rule[s] of criminal procedure.”³⁵³ *Apprendi* clearly deals with criminal procedure because it “concerns when the criminal law may punish a person for a crime” and hence “goes to the question of guilt.”³⁵⁴ There is also “a strong argument that it is a ‘watershed rule’” because “Justice O’Connor used that very term to describe the decision.”³⁵⁵ It is apparent that courts are now

maximum, was such a high dollar amount that it violated *Apprendi*. *Id.* at 1053-54. The judge easily dismissed this allegation by stating the defendant,

treats [*Apprendi*] as fundamentally changing the law of criminal sentencing, so that every fact affecting punishment must be treated as an “element of the offense,” with all that implies in criminal law. Yet that is not how the Supreme Court described its decision. What *Apprendi* holds is: “Other than the fact of a criminal conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”

Id. (quoting *Apprendi*, 530 U.S. at 490); cf. Thornton & Allenbaugh, *supra* note 302, at 444-45 (arguing *Apprendi* applies to tax fraud because sentencing for economic crimes “is driven entirely by sentencing factors”).

350. See *Meshack*, 225 F.3d at 576; see also *United States v. Doggett*, 230 F.3d 160, 165 (5th Cir. 2000). The court in *Keith*, 230 F.3d at 786-87 noted *Meshack* was the case where the Fifth Circuit limited *Apprendi* and thereafter, *Doggett* “squarely” held that *Apprendi* should only be applied when drug quantity extends the sentence beyond the statutory maximum. Thus, in *Keith*, the court concluded that even though the defendant’s sentence was extended to twenty years because of drug quantity, *Apprendi* did not apply since this was well within the statutory maximum of thirty years. *Keith*, 230 F.3d at 737.

351. See Chemerinsky, *supra* note 14, at 521.

352. *Id.* at 522-23 (internal quotations omitted) (quoting *Mackey*, 401 U.S. at 692-93 (Harlan, J., concurring in part and dissenting in part) (citation omitted)).

353. *Id.* at 523 (internal quotation omitted) (quoting *Teague v. Lane*, 489 U.S. 288, 311 (1989) (discussing *Mackey*)).

354. *Id.*

355. *Id.*

faced with the question of how to handle prisoners' appeals that claim they were sentenced in violation of *Apprendi*.³⁵⁶

Although courts have begun applying *Apprendi* to drug laws, federal circuit courts have declined to apply *Apprendi* retroactively in successive habeas corpus appeals.³⁵⁷ The First, Seventh, Ninth, and Eleventh circuits have taken the approach "that until the Supreme Court says whether *Apprendi* is retroactive, the case cannot be used by prisoners to request a certificate of appealability from a federal court to file a second or successive motion for habeas corpus relief under 28 U.S.C. [§] 2225."³⁵⁸ A Minnesota federal district court found otherwise and attempted to apply *Apprendi* retroactively "because its holding concerns procedures that 'are implicit in the concept of ordered liberty.'"³⁵⁹ However, this decision was overturned on appeal.³⁶⁰

In *Talbott v. Indiana*, Circuit Judge Frank H. Easterbrook summarily rejected defendant's argument that *Apprendi* applied to habeas corpus appeals.³⁶¹ The judge stated:

[the defendant] is among the throngs of state and federal prisoners who believe that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), undermines their sentences. . . . Not one of the *Apprendi*-based

356. See *id.* at 522-23.

357. Cammarere, *supra* note 3, at 41; see also Claire Cooper & Denny Walsh, *Courts Must Reconsider Some Sentences For Offenders*, SACRAMENTO BEE, at <http://www.november.org/aprendi9thcircuit.html> (last visited Jan. 27, 2001) (summarizing that many courts have found violations of the *Apprendi* statutory maximum rule, however, the defendants' convictions were still upheld because there was "harmless error").

358. Cammarere, *supra* note 3, at 41; see also, e.g., *Sustache-Rivera v. United States*, 221 F.3d 10-18 (1st Cir. 2000). The First Circuit asked whether the defendant is able to raise a 28 U.S.C. § 2255 habeas corpus claim either as a first petition, or by permission of the court as a second or successive petition, or because the petition fell within § 2255's savings clause. *Sustache-Rivera*, 221 F.3d at 11. The court followed the rule that a new constitutional rule is only retroactive if the Supreme Court chooses to give it that status. *Id.* at 16-17.

The Supreme Court may yet hold that the *Jones/Apprendi* rule is to be retroactively applied to cases on collateral review. (This likely depends upon whether the Court considers the *Jones/Apprendi* rule procedural or substantive.) Until that time, any second or successive petition seeking retroactive application of *Jones* must be considered premature.

Id. at 15 n.12. Thus, for now, federal courts have rejected a retroactive application of *Apprendi*. Cammarere, *supra* note 3, at 41.

359. Chmerinsky, *supra* note 2, at 104 (citing *United States v. Murphy*, 109 F. Supp. 2d 1059 (D. Minn. 2000) (quoting *Teague v. Lane*, 489 U.S. 288, 307 (1989))).

360. The district court's decision in *Murphy* to grant habeas corpus relief was vacated on appeal and the defendant's original sentence restored because the Supreme Court has not held *Apprendi* applies retroactively. *Murphy v. United States*, 268 F.3d 599, 600-01 (8th Cir. 2001), *cert. denied* 122 S. Ct. 1189 (2002) (mem.).

361. *Talbott v. Indiana*, 226 F.3d 866, 868-69 (7th Cir. 2000).

applications for permission to file has been granted, however, and none is going to be granted in the near future, for a fundamental reason: a new decision of the Supreme Court justifies a second or successive collateral attack only if it establishes “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” 28 U.S.C. §§ 2244(b)(2)(A), 2255 ¶ 8(2). . . .

Apprendi does not state that it applies retroactively to other cases on collateral review. No other decision of the Supreme Court applies *Apprendi* retroactively to cases on collateral review. . . . [Thus], no application based on *Apprendi* can be authorized under § 2244 (b)(2)(A) or § 2255 ¶ 8(2). *Accord, Sustache-Rivera v. United States*, 221 F.3d 8 (1st Cir. 2000). *If the Supreme Court ultimately declares that Apprendi applies retroactively on collateral attack, we will authorize successive collateral review of cases to which Apprendi applies. Until then prisoners should hold their horses and stop wasting everyone’s time with futile applications.*³⁶²

Therefore, although *Apprendi* did announce a new constitutional rule, courts tend to reduce the scale of *Apprendi* by refusing to hear prisoners’ appeals.³⁶³

ii. *Apprendi* Does Not Overrule *Almendarez-Torres*

In addition to denying retroactivity, courts have cut back the scope of *Apprendi* by upholding previous Supreme Court cases that could possibly be invalidated under a broad reading of *Apprendi*.³⁶⁴ In *United States v. Gebele*,³⁶⁵ the defendant argued that *Apprendi* overruled *Almendarez-Torres* because the Justices in the *Apprendi* majority posited that *Almendarez-Torres* was wrongly decided.³⁶⁶ *Almendarez-Torres* is still good law because

362. *Id.* (emphasis added).

363. *Id.*

364. *See generally*, *United States v. Gebele*, 117 F. Supp. 2d 540 (W.D. Va. 2000) (upholding recidivism exception).

365. 117 F. Supp. 2d at 544. In *Gebele*, the sixty-year-old defendant was found guilty of illegally entering the United States. *Id.* He was also convicted in the United States when he was a juvenile for carrying a weapon. *Id.* The fact of this prior conviction (recidivism) was found by a judge as a sentencing factor, and used to extend his conviction beyond the two-year statutory maximum for illegal reentry cases. *Id.*

366. *Id.* at 548-49. The *Gebele* court reasoned that the Supreme Court clearly stated it was not overruling *Almendarez-Torres*, in *Apprendi*:

Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, *Apprendi* does not contest the decision’s validity and we need not revisit it for

the "court is not permitted to ignore it by 'counting Justices,' or by speculating about what the Supreme Court might do in the future."³⁶⁷ Furthermore, it is compelling that the Court specifically exempted recidivism from the *Apprendi* holding.³⁶⁸ Therefore, *Apprendi*'s impact can be limited by continuing to recognize recidivism as an exception to the statutory maximum rule.³⁶⁹

B. Legislatures

As Justices O'Connor and Breyer highlighted in their dissents, legislatures have long relied on the Court's decisions in *McMillian*, where the Court reaffirmed that legislatures enjoy substantial flexibility and deference in their definitions of elements of the crime, and *Almendarez-Torres*, where the Court upheld extending a sentence beyond the statutory maximum.³⁷⁰ Depending on how expansively *Apprendi* is interpreted, legislatures may be forced to rewrite massive amounts of criminal law, especially in the area of drug offenses.³⁷¹ However, "even if courts begin reading *Apprendi* broadly and strike down statutes, . . . lawmakers will not rush to act. 'This is not a ruling where a lot [of] defendants walk free from jail, . . . [i]nstead, it involves resentencing.'"³⁷² The result is that legislatures

purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset.

Id. at 548-49 (quoting *Apprendi*, 530 U.S. at 489-90 (footnote omitted)).

367. *Id.* at 549.

368. *Id.* "'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Id.* (alteration in original) (quoting *Apprendi*, 530 U.S. at 490).

369. *See id.*

370. *Apprendi*, 530 U.S. at 533-35 (O'Connor, J., dissenting), 555-64 (Breyer, J., dissenting) *see also supra* notes 229-234, 260-274 and accompanying text. Although legislatures generally retain the freedom to identify elements of a crime, and the sentencing factors that may be used to enhance punishment of that crime,

recent Supreme Court sentencing jurisprudence suggests strongly that legislatures may not draft criminal statutes in such a way that sentencing factors trump criminal elements. In other words, legislatures may not draft criminal statutes that make the conduct underlying the sentencing factor the focus of punishment, rather than the conduct constituting the elements of the criminal offense. As legislatures may not delegate to another body authority they themselves do not possess, it follows that sentencing commissions, to whom legislatures have delegated authority to promulgate sentencing guidelines, likewise may not draft sentencing guidelines to include sentencing factors that trump the elements of the crime.

Thornton & Allenbaugh, *supra* note 302, at 442.

371. *See Apprendi*, 530 U.S. at 564-65 (noting that legislatures have previously relied on the belief that "they were permitted to increase a statutory maximum sentence on the basis of a sentencing factor").

372. Cammarere, *supra* note 3, at 41.

can wait for the courts to interpret criminal statutes, rather than immediately passing new laws.³⁷³ Although *Apprendi* could be read “‘extremely broadly’” so that many federal statutes would have to be reworked, this may not be necessary depending on how prosecutors present their cases to grand juries.³⁷⁴ As long as prosecutors present sentencing factor issues to juries, such as drug quantity, “[s]tatutes that seemingly violate *Apprendi*’s holding could remain intact”³⁷⁵

Surprisingly, *Apprendi* is expected to “have only a modest impact in the area of hate crime legislation because most states already require a jury to make the finding of motive under the reasonable doubt standard.”³⁷⁶ The impact will not be dramatic because more than forty state legislatures have enacted new hate-crime legislation that treats bias-motivated violence as an element of the hate crime.³⁷⁷ Other states have opted to add bias as an element to already existing crimes.³⁷⁸ Furthermore, the widely used “‘three-strikes-and-you’re in’ prison policy” appears safe because the majority specifically excluded recidivism, which is one of the routine methods used to increase a defendant’s penalty.³⁷⁹

373. See *id.*; see also Robert Batey, *Sentencing Guidelines and Statutory Maximums in Florida: How Best to Respond to Apprendi*, 74 FLA. B. J. 57, 58-59 (2000) (arguing Florida legislature should not rush to implement new statutes because few Florida guideline sentences exceed the statutory maximum).

374. Cammarere, *supra* note 3, at 41.

375. *Id.*

376. Greenhouse, *supra* note 2, at A19; see also Greenhouse, *supra* note 317, at A22 (determining only New Jersey and North Carolina authorize judges rather than juries to make the hate-motive determination); Mumma, *supra*, note 150, at A1 (noting that New Jersey was one of the few states that allowed a judge to find a hate crime had been committed by a preponderance of the evidence standard).

New Jersey’s legislature created a hate crime statute that was the exception, rather than the norm. See Brief of Amici Curiae National Association of Criminal Defense Lawyers *et al.* at 10, *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (No. 99-478), available at 2000 WL 35840 “What the State of New Jersey seeks to uphold in this case is a radical departure” from the practices of other states because this is a wide deviation from “traditional processes” and “constitutionally protected values.” *Id.* As such, most other states have constitutional hate statutes. See *id.*

377. See Mumma, *supra*, note 150, at A1. New Jersey’s governor was unconcerned about the *Apprendi* decision because the legislature only needs to rewrite the state’s Ethnic Intimidation Act. See *id.*; see also Senate Panel OKs New Hate Crimes Law After U.S. Supreme Court Rejection, ASSOCIATED PRESS NEWSWIREs, Dec. 14, 2000 (describing how New Jersey Senate Judiciary Committee enacted a new hate crime law that is now compatible with *Apprendi*); cf. Murray, *supra* note 171, at A13 (finding *Apprendi* will make it much tougher to prosecute hate crimes in states where the judge still makes the determination).

378. Mumma, *supra*, note 150, at A1.

379. *Id.* Brian Levin, from the Center for Hate and Extremism, conceded “[e]ven though we lost, it is not a blow to hate-crime laws,” because what the court focuses on in *Apprendi* is sentencing factors. *Id.*; see also Brian Levin, *Bias Crimes: A Theoretical & Practical Overview*, 4 STAN. L. & POL’Y REV. 165, 168-70 (1993) (summarizing how state hate crime legislation has evolved to provide substantial protection to individuals).

C. Individuals

1. Victims and Communities

Nearly all states have hate crime laws that protect individuals by subjecting a defendant to harsher punishment if victims are targeted because of their sexual orientation, race, or religion.³⁸⁰ Although most people in the legal community believe that individuals will remain safe from hatred and intimidation,³⁸¹ actual victims of hate crimes, like Mattie Harrell, whose house was shot at by Charles Appendi, strongly disagree.³⁸² While the Court and Appendi thought the extra sentence for his hate crime was too stiff, Harrell believes it is not tough enough.³⁸³ She lamented “[e]veryone felt they were going to throw the book at him and throw it hard.”³⁸⁴ Victims

380. Melanie Burney, *Beyond a Reasonable Doubt? Court to Consider Whether Judge Should Have Added Punishment*, ABC NEWS.COM (Mar. 28, 2000), at http://www.abcnews.go.com/sections/us/DailyNews/scotus_hatecrimes000328.html.

381. See, e.g., Murray, *supra* note 171, at A13. The Anti-Defamation League’s counsel minimized Appendi’s impact on hate crime laws because most states that give harsher sentences for hate crimes already make hate motive part of the offense to be proven. *Id.*; see also *supra* notes 376-377 and accompanying text; *supra* note 379.

382. See Jessica Peterson, Medill News Service, *The Aftermath of a Family’s 1994 Nightmare*, at <http://www.medill.northwestern.edu/docket/99-0478victims.html> (last visited Mar. 13, 2002) (providing excerpt from an American Civil Liberties Union report). Although Mattie still lives in the same house where the shootings occurred, she believes it turned her dream home into “the scene of ‘a nightmare.’” *Id.* She stated, “[Charles Appendi] destroyed a family, . . . [w]e could’ve been happy. We’ll probably never be the same again.” *Id.* When the incident occurred, Mattie and Michael Sr.’s children - Michael Jr., was eight; Dawn, was thirteen; and Philip was fifteen years old. *Id.* After the shootings, Michael Jr., began having nightmares, and behavioral problems at school. *Id.*

Mattie and Michael Sr. divorced several years after the ordeal, and she now uses her maiden name, Harrell. *Id.* Mattie claimed Appendi’s crimes “‘were a big part’” of the decision to divorce. *Id.* Their daughter, Dawn, lives with Mattie, and their son, Michael Jr., currently resides with Michael Sr., in the Atlantic City area. *Id.* Mattie testified against Appendi in his first parole hearing and remains apprehensive that someday Appendi will be released from prison. *Id.* She commented, “‘Society has to know, hey, we’re not going to tolerate this [hate crime]’” *Id.*; see also Charles Bierbauer, *Supreme Court to Hear Arguments on Hate Crimes New Jersey Man Claims Law Unconstitutional*, CNN.com, at <http://www.cnn.com/2000/US/03/27/scotus.hate.02/index.html> (Mar. 27, 2000).

383. See Charles Bierbauer, *Supreme Court to Hear Arguments on Hate Crimes New Jersey Man Claims Law Unconstitutional*, CNN.com, at <http://www.cnn.com/2000/US/03/27/scotus.hate.02/index.html> (Mar. 27, 2000). Mattie Harrell recalled the damage to her house after Appendi shot at it because he allegedly wanted to send a message to her family that African-Americans were not wanted in the neighborhood. See *id.* She stated, “[t]he place was just a mess - hitting the two glass doors, hitting the moonlight, hitting the stucco on the side of the house.” *Id.*

384. *Id.*; see also *Amici Briefs in Appendi*, 9 N.J. LAW.: WKLY. NEWSPAPER 613, Mar. 27, 2000, at 13. The Anti-Defamation League’s brief to the court argues that because hate crimes have such a destructive effect on the community, states should be able to deter these crimes by having a judge

of hate crimes, such as Harrell, and the individuals in communities where they occur are exceptionally susceptible to the emotional trauma caused by hate offenders.³⁸⁵ In particular, individuals who live in New Jersey may be concerned about hate crimes being committed in their neighborhoods because that state “has the highest number of reported bias crimes per capita in the nation” and except for the year 2000, has also “had the highest number of bias crimes in terms of actual numbers.”³⁸⁶ As the Anti-Defamation League points out, hate crimes pose a unique danger because:

[h]ate-motivated crimes are among the most destructive of the public safety and happiness. Such crimes have a distinctively greater societal impact than other crimes because an attack on an individual is also an attack on a larger group or community, with the purpose of harming both. They are more likely than others to cause an entire community to feel concerned for their safety, isolated and unprotected by the justice system. This results in fear, anger and suspicion - and even to crimes of retaliation. [Brian Levin, *Bias Crimes: A Theoretical & Practical Overview*, 4 STAN. L. & POL’Y REV. 165, 167-68 (1993).] “One need look no further than the recent social unrest in the [N]ation’s cities to see that race-based threats may cause more harm to society and to individuals than other threats.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 433 [n.9] (1992) (Stevens, J., concurring).³⁸⁷

Thus, victims of hate crimes and others in the communities where they occur may feel more physically and psychologically threatened after *Apprendi*.³⁸⁸ This is because it is harder to prove a hate crime occurred since

impose severe sanctions (as in a capital punishment case) by a preponderance of the evidence. *See id.*; see also Brief of Amici Curiae Anti-Defamation League, *Apprendi v. New Jersey*, 520 U.S. 466 (2000) (No. 99-478), available at LEXIS 1999 U.S. Briefs 478, at *4-5.

385. See Kristen M. Jasket, Note, *Racists, Skinheads and Gay-Bashers Beware: Congress Joins the Battle Against Hate Crimes By Proposing the Hate Crimes Prevention Act of 1999*, 24 SETON HALL LEGIS. J. 509, 537, 539-40 (2000) (stating “[h]ate crimes tear at the fabric of communities, thereby creating fear and dissention among residents and result in neighborhoods with relations among groups so strained that they can never be repaired”); see also Symposium, *Hate-Crimes Legislation: Local, State and Federal Perspectives*, 24 SETON HALL LEGIS. J. 371, 398 (2000) (discussing the theory that bias-crime legislation gives disenfranchised individuals somewhere to turn for protection); Steven Bennett Weisburd & Brian Levin, “*On the Basis of Sex: Recognizing Gender-Based Bias Crimes*,” 5 STAN. L. & POL’Y REV. 21, 23, 26-27 (1994) (detailing the effects and policy behind hate crimes and concluding these crimes have an invidious impact on communities).

386. Symposium, *supra* note 385, at 394 (quoting statements from Robin Parker, Deputy Attorney General of New Jersey and Chief of New Jersey’s Office of Bias Crime and Community Relations).

387. Brief of Amici Curiae Anti-Defamation League, *Apprendi v. New Jersey*, 520 U.S. 466 (2000) (No. 99-478), available at LEXIS 1999 U.S. Briefs 478, at *5.

388. See Project, *Crimes Motivated by Hatred: The Constitutionality and Impact of Hate Crime Legislation in the United States*, 1 SYRACUSE J. LEGIS. & POL’Y 29, 32 (1995). Recent studies indicate hate crimes are increasing against African-Americans, Jews, and gays. Charles Bierbauer,

the hate motive must be established beyond a reasonable doubt to a jury if the defendant's punishment would be increased beyond the statutory maximum.³⁸⁹

2. Defendants

While victims and various communities may be disturbed by the *Apprendi* decision, defendants and defense attorneys agree with Justice Stevens that the decision is completely fair because "[t]he New Jersey procedure challenged in this case is an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system."³⁹⁰ For defense attorneys, *Apprendi* validates the argument they have been making "for years that it is wrong to give their clients more time based on evidence never considered by a jury."³⁹¹ Joseph O'Neill, *Apprendi*'s attorney, recently attended a hate crime symposium and argued that a ruling in favor of his client would help safeguard individuals' liberty and constitutional rights.³⁹² O'Neill argues that now everybody will have a better chance of protecting themselves from an erroneous accusation because a jury and proof beyond a reasonable doubt stand between them and their accuser.³⁹³ Moreover, when racially biased crimes are involved, *Apprendi* protects individuals from the exceptionally damaging stigma of being a criminal, an immoral person and also a racist.³⁹⁴ Therefore, after *Apprendi*, individuals receive greater protection against erroneous convictions and social stigmatization because a jury acts as the main fact-finder.³⁹⁵ Finally, *Apprendi* shifts power back to juries who are citizens in the defendant's community and can be held

Supreme Court to Hear Arguments on Hate Crimes New Jersey Man Claims Law Unconstitutional, CNN.com, at <http://www.cnn.com/2000/US/03/27/scotus.hate.02/index.html> (Mar. 27, 2000). Mark Potok from the Southern Poverty Law Center recognized that "[h]omosexuals are six times more likely than Jews or Hispanics to be attacked because of who they are - and twice as likely as blacks (to be attacked)."³⁹⁶ *Id.*

389. See *Apprendi*, 530 U.S. at 492-94.

390. *Id.* at 497.

391. Masters, *supra* note 2, at A1.

392. Symposium, *supra* note 385, at 399-403 (presenting defense counsel's version of the facts and likely impact of *Apprendi*'s holding). A New Jersey judge countered by arguing that New Jersey's hate crime statute should be upheld because the Constitution does not allow people to express their hatred through criminal acts. *Id.* at 420.

393. *Id.* at 403 (stating "[i]f the person cannot be proven guilty beyond a reasonable doubt, then that person should not be convicted").

394. *Id.* (elaborating that those charged with a hate crime "should get their constitutional safeguards just like anybody else charged with committing a crime").

395. See *id.*

accountable for the sentences they impose.³⁹⁶ This is a movement away from “experts” that are generally not answerable for their decisions.³⁹⁷

VI. CONCLUSION

It is now clear that with the exception of recidivism, “the jury must find the facts that can lead to a sentence longer than what would otherwise be the maximum”³⁹⁸ However, “the *Apprendi* case raised a more difficult question that does not have a clear answer.”³⁹⁹ *Apprendi* left open the issue of whether it is constitutional for the judge to make “a number of crucial findings that do not necessarily bring a sentence above the statutory maximum, but that can end up increasing a sentence sharply *within the statutory range*.”⁴⁰⁰ *Apprendi* also does not answer whether factors that are found by a judge to create a mandatory minimum sentence must be proved to a jury and found beyond a reasonable doubt.⁴⁰¹ Thus, after *Apprendi*, courts and legislatures are left with the Sisyphean task of determining the precise limits of the Court’s rule, which safeguards individuals’ due process rights, yet threatens state and federal sentencing schemes throughout the nation if broadly applied.⁴⁰²

Given that *Apprendi* has the potential to effect widespread change in the world of criminal sentencing at local, state, and federal levels, courts should continue to narrowly construe *Apprendi* because it is unclear how far the Supreme Court plans to extend their decision.⁴⁰³ Based on the Court’s decision in *Jones* and *Apprendi*, it appears that the Court is attempting to define the limits of *McMillan*.⁴⁰⁴ However, it remains uncertain whether the

396. Rosenberg, *supra* note 31, at 508-09.

397. *Id.* (noting sentencing factors shift power to judges and away from juries, thereby limiting the role of the citizenry in governmental affairs).

398. Greenhouse, *supra* note 336, at A18; *see also Apprendi*, 530 U.S. at 490.

399. Greenhouse, *supra* note 336, at A18.

400. *Id.* (emphasis added) (noting judges make these type of findings under the federal Sentencing Guidelines).

401. *See Apprendi*, 530 U.S. at 521-22 (Thomas, J., concurring) (arguing for the broadest possible reading of *Apprendi*), 550-52 (O’Connor, J., dissenting) (discussing the confusion left in the wake of *Apprendi*). Justice Thomas believes it is clear *Apprendi* would cover the situation where a defendant could be sentenced between zero to ten years, and a finding of a fact by a judge would impose a mandatory minimum sentence of five years. *Id.* at 521-22; *see also Chemerinsky, supra* note 14, at 522 (concluding *Apprendi*’s “central rationale - that it is wrong to convict a person of one crime and impose punishment for another - logically applies to factors used to enhance penalties within the statutory range”); Batey, *supra* note 373, at 59 (reasoning “the *Apprendi* Court strongly implied that it would view such legislative behavior (what some commentators have already begun to call ‘*Apprendi* evasion’) as constitutionally suspect”).

402. *See Apprendi* 530 U.S. at 481-494, 496-97; *cf.* 550-52 (O’Connor, J., dissenting) (predicting “disruption in the world of sentencing”); 565 (Breyer, J., dissenting) (concluding the “Court’s new rule will likely impede legislative attempts to provide authoritative guidance as to how courts should respond to the presence of traditional sentencing factors”).

403. *See supra* Part V.

404. *See* Knoll & Singer, *supra* note 5, at 1112-16. “[H]aving gone from *Mullaney* to *Patterson*

Court will expand *Apprendi*'s holding in lieu of *Patterson* and *McMillan*, which support broad legislative discretion, and *Almendarez-Torres*, which upholds recidivism as a sentencing factor even though it extends the conviction beyond the statutory maximum.⁴⁰⁵ Regardless, the Court has sent the powerful message that it will not tolerate statutes that attempt to deprive defendants of their constitutional rights by redefining elements of a crime as sentencing factors, or using sentencing factors to extend a person's conviction beyond the statutory maximum.⁴⁰⁶

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to *McMillan* to *Almendarez-Torres* - the Court is back at square one in assessing the legitimacy of legislative declarations that remove from the shoulders of prosecutors the burden of proof of facts that drastically affect sentences. . . . *Winship* lives again." *Id.* at 1118.

405. See *id.* at 1112-16; see also *supra* notes 73-124 and accompanying text. Typically the Court has left state legislatures the power to define the elements of crimes and frequently the Court's "few ventures into creating constitutional limits on the substantive criminal law have regularly proven abortive." Lynch, *supra* note 268, at 322.

406. See generally *Apprendi*, 530 U.S. at 468-523; *Jones v. United States*, 526 U.S. 227, 229-53 (1999); *Mullaney v. Wilbur*, 421 U.S. 684, 684-706 (1975); *In re Winship*, 397 U.S. 358, 359-75 (1970).

407. J.D. Candidate, Pepperdine University School of Law, May, 2002; B.S., Business Administration, cum laude, University of Southern California, 1999. I first learned about and became interested in the *Apprendi v. New Jersey* case after I attended "The Supreme Court's Most Extraordinary Term" symposium at Pepperdine, hosted by Professor Douglas W. Kmiec. There, Professor Erwin Chemerinsky discussed *Apprendi* and other criminal law decisions.
